Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

WESTECH GEAR CORPORATION,

Petitioner,

vs.

JOHN A. ANZALONE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of New Jersey

PETITION FOR WRIT OF CERTIORARI

TIM G. CEPERLEY, Esq.
ROBYN K. JOHNSON, Esq.
RODI, POLLOCK, PETTKER,
GALBRAITH & PHILLIPS,
A Law Corporation
801 South Grand Avenue, Suite 400
Los Angeles, California 90017
Telephone: (213) 875-4900

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

To invoke the government contractor defense as set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), is a government contractor required to show – in addition to the three elements set forth in Boyle – that the specific design feature allegedly responsible for causing harm was expressly required or prohibited by the government?

LIST OF PARTIES

There are no parties to this Petition who are not identified in the caption.

LIST OF CORPORATIONS RELATED TO PETITIONER (RULE 29.1)

The parent company of Petitioner WesTech Gear Corporation is Zimmerman Holdings, Inc., a California corporation. Petitioner has no subsidiaries which are not wholly owned by it.

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28 U.S.C. § 1257(a) 1

PETITION FOR A WRIT OF CERTIORARI

WesTech Gear Corporation respectfully petitions that a writ of certiorari issue to review the published opinion of the Supreme Court of the State of New Jersey, filed July 26, 1995.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Jersey (App.,[1] *infra*, 1a-31a) is reported at 141 N.J. 256, 661 A.2d 796 (1995), and its grant of the petition for certification of Petitioner is reported at 137 N.J. 314, 645 A.2d 142 (1994).

The opinion of the Superior Court of New Jersey, Appellate Division (App., *infra*, 32a-53a), which includes changes made by the Appellate Division in its original opinion (App., *infra*, 60a-81a) in its ruling on Petitioner's motion for reconsideration (App., *infra*, 54a-59a), is reported at 271 N.J. Super. 522, 638 A.2d 1365 (1994).

The order and judgment of the Superior Court of New Jersey, Law Division, Hudson County dated May 11, 1993 (App., *infra*, 82a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. section 1257(a).

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[1] "App." refers to the attached Appendix.

The New Jersey Supreme Court's opinion was filed on July 26, 1995. This Petition is therefore timely filed pursuant to Supreme Court Rules 13.1 and 30.1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2680(a), which provides as follows:

> The provisions of this chapter and Section 1346(b) of this title shall not apply to –
>
> > (a) any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused, . . .

STATEMENT OF THE CASE

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), this Court held that the "government contractor defense" barred state law tort claims against a government contractor of military equipment if (1) the United States approved reasonably precise specifications for the equipment, (2) the equipment conformed to those specifications, and (3) the contractor warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id.* at 512. At issue in this case is whether, under *Boyle*, the contractor must prove that the particular defect at issue was specifically required or

prohibited by the government before it can avail itself of the defense.

A. Proceedings in the Trial Court

Petitioner WesTech Gear Corporation was sued by Respondent John Anzalone on March 13, 1989 in an action filed in the Superior Court of New Jersey, Law Division, Hudson County. In the suit, Respondent, a civilian employee of the United States Navy, sought damages for alleged partial amputation of his left hand when it was caught in a pulley on the lower sheave block of a device known as a "ram tensioner" on a U.S. Navy vessel.[2] Petitioner is the successor to Western Gear Corporation, which manufactured the ram tensioner under contract with the Navy.[3]

The ram tensioner is a component of a replenishment system on U.S. Navy vessels which enables a tanker ship to restore and/or refuel a receiving vessel while at sea. In a typical replenishment operation, a wire rope known as a "spanwire" or "highline" extends from the delivering ship to the receiving ship to provide support for connecting fuel and supply lines. The spanwire is reeved through a ram tensioner, which contains a series

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[2] Respondent's Complaint alleged that Petitioner WesTech had negligently designed, manufactured, distributed and installed the ram tensioner. As described below, summary judgment in favor of Petitioner was granted as to those claims not subject to the government contractor defense.

[3] Petitioner will use the names WesTech Gear Corporation or WesTech and Western Gear Corporation or Western Gear interchangeably in this Petition.

of pulleys at both ends of a vertical column (collectively termed the upper and lower sheave block or assembly). It is operated by a hydraulic ram to maintain constant tension on the spanwire by either "paying out" or "taking in" the spanwire to prevent supply lines from falling into the water.

In its answer to the Complaint, filed April 20, 1989, WesTech alleged that Respondent was barred from any recovery because the ram tensioner was made in accordance with plans and specifications issued by the United States Government.

In January 1993, Petitioner WesTech filed a motion for summary judgment on grounds that the government contractor defense, as set forth in *Boyle*, barred Respondent's claim that the ram tensioner was defective.[4] Appellant opposed the summary judgment motion and, by means of a cross-motion, sought to strike the government contractor defense.

On April 30, 1993, the Superior Court entered summary judgment in favor of Petitioner and denied Respondent's cross-motion to strike the government contractor defense. The trial court determined that the government contractor defense was applicable because each of the three requirements under *Boyle* had been met, that is, (1)

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[4] As noted above in note 2, Respondent's claims that WesTech negligently and defectively manufactured, distributed and installed the ram tensioner are not at issue here. Summary judgment was granted in favor of Petitioner on such claims and was affirmed by both the Appellate Division and the New Jersey Supreme Court. App., *infra*, at 1a-53a.

the Navy had approved reasonably detailed specifications for the ram tensioner, (2) the ram tensioner conformed to those specifications, and (3) Western Gear warned the Navy about the dangers in the use of the equipment which were known to it but unknown to the Navy.

The undisputed evidence in support of the motion showed that the concept of the ram tensioner originated with a Navy engineer. According to the Navy engineer, the ram tensioner was conceived and developed by the Navy at Navy expense, and its installation and application on U.S. Navy ships was completely controlled by the Navy. The Navy awarded the first contract for design and development to Sancor Corporation in 1958. On August 7, 1961, after testing and evaluating the Sancor ram tensioner at sea, the Navy drafted its specification SHIPS-T-3945. Based on that specification and the final Sancor drawings, the Navy issued a procurement request that sought proposals for the development, manufacture, and testing of 78 hydraulic ram tensioners. The Navy subsequently awarded Western Gear a contract to manufacture the ram tensioners.

The lower sheave assembly was an integral part of the ram tensioner. The Navy reviewed and approved both preliminary and final drawings prepared by Western Gear and there were extensive discussions between Western Gear and the Navy about a variety of design features of the ram tensioner and its lower sheave assembly. The ram tensioner in question was delivered to the Navy in either late 1963 or early 1964. It and all the other ram tensioners supplied by Western Gear were manufactured in accordance with the Navy's specifications. Western

Gear had no authority to install the ram tensioner and absolutely no input as to its placement within a replenishment configuration on a Navy ship.

B. Proceedings before the Superior Court of New Jersey, Appellate Division

Respondent appealed to the Appellate Division of the New Jersey Superior Court which issued its written decision on March 25, 1994, reversing the trial court's judgment. (App., *infra*, 32a-53a). On April 4, 1994, WesTech filed a motion for reconsideration which sought clarification of the Appellate Division's mandate to the lower court and reconsideration of certain factual findings and legal conclusions. On May 5, 1994, the Appellate Division denied the motion, but corrected and supplemented its opinion. (App., *infra*, 54a-59a).

The Appellate Division upheld the trial court's determination that the Navy had approved reasonably detailed specifications for the ram tensioner and that the other elements of the *Boyle* test had been established by Petitioner. But it held that the government contractor defense under *Boyle* was not applicable because Petitioner was not prohibited by the terms of the Navy's contract specifications from including safety devices on the lower sheave assembly of the ram tensioner and that there was therefore no conflict between its contractual obligation to the government and a state-prescribed duty of care. (App., *infra*, 52a-53a)

C. Proceedings Before the New Jersey Supreme Court.

On May 23, 1994, WesTech petitioned the New Jersey Supreme Court to certify the case on the grounds that the Appellate Division's formulation of the government contractor defense was in conflict with federal common law as established by this Court in *Boyle, supra.* The New Jersey Supreme Court granted certification.

On July 26, 1995, the New Jersey Supreme Court, being equally divided, affirmed the decision of the Appellate Division. The concurring opinion substantially adopted the reasoning of the Appellate Division and held that

> . . . the government specifications, according to which the ram tensioner was designed, manufactured and supplied, did not impose any requirements that would conflict with the duty of the contractor under state law to provide a product that incorporated a safety feature for the lower sheave assembly of the ram tensioner, and hence, the government contractor defense is inapplicable as a bar to [Petitioner's] liability.

(App., *infra,* 5a)

As did the Appellate Division, the New Jersey Supreme Court upheld the trial court's determination that the Navy had approved reasonably detailed specifications for the ram tensioner, characterizing the specifications as "very detailed and specific," (App., *infra,* 14a) and that the other elements of the *Boyle* test had been established by Petitioner. Notwithstanding, it concluded:

> We determine from the record that a safety feature for the lower sheave assembly of the ram tensioner may be required as a matter of state law without posing a significant conflict with identifiable government interests. Several considerations support that determination: (1) such a safety feature is omitted from the specification in that it is neither expressly required nor expressly prohibited; further there are no specifications relating to the safety aspects of the lower sheave assembly; (2) the omission of such safety specifications is in the context of detailed and precise specifications, covering all of the important features of the product; the specifications were formulated, reviewed and considered and approved by the government; and, (3) the objectives of the design of the product, reflected in the specifications, were functional efficiency, simplicity in operation and ease in installment and placement; safety in the operation of the lower sheave assembly was neither a paramount nor an incidental concern in the design of the product. It is thus inferable that a safety feature that would overcome the risk of injury from the operation of the lower sheave assembly could be incorporated into the product without substantially affecting or modifying any of the features required by the express specifications and without impairing the basic objectives of the design of the ram tensioner.

(App., *infra*, 24a-25a)

In dissent, Justice Pollock, joined by Justices O'Hern and Garibaldi, stated that the concurrence had misinterpreted and, in effect, overruled *Boyle*. The dissent states:

> . . . the concurrence infers that because the Navy did not explicitly forbid WesTech from installing a guard on the ram tensioner, WesTech had a duty to design and provide such a device. That inference stands *Boyle* on its head . . .

(App., *infra*, 28a)

The dissent continues:

> The flaw in the concurrence's analysis is that instead of applying the three-part *Boyle* test, it posits its own formula to determine whether the imposition of a duty on WesTech would create a "significant" conflict with the government's interests – precisely the questions that *Boyle* answered. In effect the concurrence would overrule the United States Supreme Court on an issue concerning the liability of contractors with the federal government.

(App., *infra*, 29a)

It concludes:

> If the United States Navy had manufactured the ram tensioner, it would be immune under the Federal Torts Claims Act, 28 U.S.C.A. 2680(a). To impose liability on WesTech for making a product for which the Navy could not be liable if it had made the product itself contravenes that legislative immunity. As the United States Supreme Court stated in *Boyle* '[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.'

487 U.S. at 512, 108 S.Ct. at 2518, 101 L.Ed.2d at 457-58.

(App., *infra*, 31a)

REASONS FOR THE COURT TO GRANT CERTIORARI

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), this Court identified the tort liability of those who contract with the United States Government for the supply of military equipment as an area of unique federal interest; it decided that a significant conflict exists between that federal interest and state tort law which would displace the state tort law when a judgment against a contractor would threaten a discretionary function of the United States. *Id.* at 512. *Boyle* established a three-prong test to determine when as a matter of law such a significant conflict exists and state tort law must be displaced. Under *Boyle*, state law cannot provide a basis to impose liability for design defects when the government contractor shows that: (1) the United States Government approved reasonably precise specification for the equipment, (2) the equipment conformed to those specifications, and (3) the contractor warned the Government about the dangers in the use of the equipment that were known to the supplier but not to the Government. *Id.* at 512.

Petitioner has established each element of the three-pronged *Boyle* test, including approval by the United States Navy of "detailed and very specific" specifications for the ram tensioner. Yet, the New Jersey Supreme Court

has "set *Boyle* on its head," in the words of the dissent, and in effect overruled it.

To the New Jersey Supreme Court the issue of "significant conflict" between federal interests and state tort law is an issue of fact, following a minority view adopted in the Second and Eleventh Circuits. It held that no such significant conflict exists and that Petitioner is not entitled to the defense unless it can also prove that the specific defect at issue – here, the absence of a guard on the lower sheave assembly – was expressly required or prohibited by the Navy. That requirement is directly contrary to *Boyle* and, if allowed to stand, will undermine the "important federal interests" that the government contractor defense is intended to protect.

Boyle ensures that a government contractor who manufactured equipment to the government's specifications is immune under state tort laws where the government, had it manufactured the equipment itself, would be immune from suit. *Id.* at 512. As discussed below, the formulation of the government contractor defense by the New Jersey Supreme Court is inconsistent with the *Boyle*, and will impose liability on contractors based on a state court's "second guessing" as to whether and to what extent the government considered possible alternative features in its design.

New Jersey is a state in which there are many military installations and activities. Theoretically the New Jersey Supreme Court's decision may be persuasive to other state courts and perhaps federal courts as well. In addition, the decision will govern any tort suits in its state courts, while similar suits in federal courts within New Jersey will be governed by the law in the Third Circuit which, as addressed below, follows *Boyle*. *Maguire v.*

Hughes Aircraft Corp., 725 F. Supp. 821 (D.N.J. 1989), aff'd 912 F.2d 67 (3rd Cir. 1990). The minority view that the existence of significant conflict between federal interests and state tort law is an issue of fact is one which is squarely presented by this case. It is an issue which this Court should, by granting certiorari, address to clarify and confirm the requirements and application of *Boyle* and to protect the important federal interests underlying the government contractor defense.

I. A "SIGNIFICANT CONFLICT" WHICH DISPLACES STATE TORT LAW EXISTS AS A MATTER OF LAW ONCE THE THREE PRONG TEST OF *BOYLE* IS SATISFIED.

To reach its holding, the New Jersey Supreme Court misread and mischaracterized *Boyle*. The government contractor defense formulated in *Boyle* is not premised on whether the government exercised discretion specifically as to each feature of government designed military equipment, but rather exercised discretion in the process of design and selection of that equipment.[5]

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[5] The New Jersey Supreme Court acknowledges that had the Navy considered and decided not to include a guard here, the defense would apply. Thus, the contractor's liability turns on the fortuitous circumstance of whether the precise defect at issue is reflected in written specifications or whether the contractor can locate the government employees involved in the design who have knowledge concerning consideration of that particular feature and its alternatives. In this case, the ram tensioner was designed nearly 40 years ago, creating a formidable task in obtaining such evidence.

The New Jersey Supreme Court mischaracterized *Boyle* when it noted that "the Supreme Court's decision in *Boyle* indicates that 'reasonably precise specifications' alone do not establish a 'signficant conflict,' " and then went on to analyze the existence of such a conflict based on "the presence or absence of safety features as an important characteristic in the government-approved design of the ram tensioner." (App., *infra*, 12a)

Under *Boyle*, whether a "significant conflict" exists is not an issue of fact. *Boyle* is based on the discretionary authority exemption under the Federal Tort Claim Act, 28 U.S.C. § 2680(a); once the government's exercise of its discretionary authority in the design of the product is established, the government contractor who manufactures the product is entitled to share in the government's sovereign immunity. Where the first two prongs of the test are satisfied, there has been an exercise of the discretionary function which is protected by this defense:

> [t]he first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.

Id., at 512.

Under *Boyle*, if the government exercises its discretion in the procurement of military equipment, state law may not substitute its evaluation of whether that discretion was properly exercised. That is, state law may not "second guess" the design of the product or the government's weighing and balancing of competing interests in its design. As Justice Scalia commented:

> . . . the selection of the appropriate design for miliary equipment to be used by our Armed Forces is assuredly a discretionary function . . . It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second guessing" of these judgments [citations omitted] through state tort suit against contractors would produce the same effect sought to be avoided by the FTCA exemption.

Id., at 511, citations in original.

The underpinning of *Boyle* is the exercise of discretion. In exercising that discretion, the government is free to discount or even ignore safety considerations and alternative design features. The three prong test determines whether the government has exercised its discretion so as to displace state tort law, and a "significant conflict" does not depend on the presence or absence of safety features in the government-approved design. In analyzing whether such features were considered by the Navy as part of its specifications for the ram tensioner, the New Jersey Supreme Court has improperly "second guessed" the Navy.

The New Jersey Supreme Court relies on two principal authorities in its formulation and application of the government contractor defense, both of which involve failure to warn claims. Neither this case nor *Boyle* involve

a failure to warn claim,[6] and thus these cases are inapposite on that basis. These cases are the genesis for the argument that the issue of "significant conflict" is one of fact, not of law, and have been expressly rejected by the Fifth Circuit (see *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991)) and criticized by other courts.

The first of these cases is *In re: Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626, 630 (2d Cir. 1990), in which the alleged defect at issue was the lack of warnings on packages and containers of asbestos supplied under government contract. The Second Circuit held that the government contractor was not entitled to immunity because the government specifications did not address warnings which were (or were not) to be placed on the asbestos packages, and that therefore the contractor could have complied with the government contract and its state law duty to warn. In that case, the government was presumptively indifferent and uninterested in the type of package in which a product was shipped.

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[6] This case does not involve a failure to warn claim. No reference is made to any failure to warn in the complaint. Respondent has not at any time denied the existence of nor challenged the adequacy of these warnings. No claim has been made that any inadequacy of these warnings contributed to the events leading to Anzalone's injury. This case relates not to warnings, but rather to the design of the ram tensioner and, in particular, the configuration of the lower sheave block. In any event, the factual record below shows that a warning *was* placed on the ram tensioner and that the Navy controlled its contents and its placement.

The New Jersey Supreme Court also relied on *Dorse v. Eagle-Picher Industries, Inc.*, 898 F.2d 1487 (11th Cir. 1990), which also involved failure to warn on asbestos packaging. Just as in *In re: Joint Asbestos Litigation*, it is reasonable to assume that the government was indifferent to the type of package in which an ingredient was shipped. The *Dorse* case simply does not support the broad proposition that the government must specify each and every design feature while explicitly rejecting others. It should also be recognized that the *Dorse* court did not even follow the *Boyle* test; it adopted its own two-prong test to analyze a failure to warn/packaging case.

In *In re: Aircraft Crash Litigation, Frederick, Maryland, May 6, 1981*, 752 F. Supp. 1326, 1351 (S.D. Ohio, W.D., August 21, 1990), the court exposed the flaws in the analysis adopted in *In re: Joint Asbestos Litigation* and *Dorse*:

> Plaintiffs rely on *Asbestos Litigation* for the proposition that if there is no conflict between the warning requirements in a military contractor's contract and the contractor's duty to warn under state law, *Boyle* requires that state law governing failure to warn claims must be applied. (cite) *Asbestos Litigation* is not the only case to so interpret *Boyle* in a failure to warn case involving asbestos-containing cement manufactured pursuant to a government contract. See, e.g., *Dorse v. Eagle-Picher Industries, Inc.*, 898 F.2d 1487 (11th Cir. 1990) (three-part test of *Boyle* need not be reached in failure to warn case where no conflict exists between state law duty to warn and labeling duty under the contract). This Court is not convinced, however, that the

> Second Circuit and Eleventh Circuits are correct in treating the "significant conflict" requirement of *Boyle* as a factual element of the defense. In this Court's view, the requisite "significant conflict" under *Boyle* is present when state law would impose liability where the three *Boyle* elements are satisfied.

Id., at 1365.

The *Aircraft Crash Litigation* case was upheld in its entirety on appeal in an unpublished disposition. This case underscores the analytic flaw in treating "significant conflict" as a factual issue and recognizes the inherent conflict with *Boyle* of such an interpretation.

II. *BOYLE* DOES NOT REQUIRE THAT THE CONTRACTOR PROVE THAT THE GOVERNMENT EXPRESSLY REQUIRED OR PROHIBITED A POSSIBLE SAFETY FEATURE TO ESTABLISH THE GOVERNMENT CONTRACTOR DEFENSE.

Boyle does not require that safety aspects of a particular design feature must have been considered in approving "reasonably precise specifications." Nor has such a requirement been imposed in the majority of cases that have followed *Boyle*. To determine whether a conflict existed between federal interests and state tort law based on "the presence or absence of safety features as an important characteristic in the government-approved design of the ram tensioner," as the New Jersey Supreme Court has done, is contrary to *Boyle*.

The New Jersey Supreme Court attempts to distinguish *Boyle* as a case in which the safety feature in question – an outward opening door latch on a helicopter –

was specifically required by the Government. In *Boyle*, Sikorsky, the defendant contractor, manufactured the CH-53 helicopter for the Navy. *Boyle v. United Technologies Corp.*, 792 F.2d 413, 414 (4th Cir. 1986). Sikorsky and the Navy worked together in preparing detailed specifications for the helicopter. *Id.* Sikorsky built a mock-up of the helicopter cockpit that included the allegedly defective escape hatch, and the Navy reviewed the mock-up and approved that design. *Id.* While the Navy approved the mock-up which included that latch, it never directly addressed in its specifications the safety aspects of the latch or alternative designs for the latch. *Id.* In *Boyle*, the government, by this review and approval process, specified the type of latch in the same way that the government specified the lower sheave assembly of the ram tensioner. There is no rational basis for the New Jersey Supreme Court's tortured analysis by which it has distinguished the facts of *Boyle* and imposed state tort law liability on Petitioner here.

In the only other reported decision involving an alleged design defect in the failure to provide a guard or warning for a hazard which caused the partial amputation of one hand, the Fifth Circuit squarely rejected the analysis adopted by the New Jersey Supreme Court. *Stout v. Borg-Warner Corp.*, 933 F.2d 331, 335 (5th Cir. 1991). In *Stout*, the plaintiff, an Army corporal, was injured while repairing an air conditioning unit when his hand was caught in the rotating blades of the unit's condenser fan. The government specifications under which the unit had been built did not expressly require, nor did they expressly prohibit, the installation of safety devices such as a guard or wire screen. The district court granted

summary judgment. On appeal, Stout argued that because the specifications were silent with respect to guarding the condenser fan, the government contractor defense did not apply. The court squarely rejected Stout's argument. *Id.*, at 335-6.[7]

It is not necessary for a contractor to demonstrate that there was discourse with the government regarding the specific design deficiency or about safety features generally. *Maguire v. Hughes Aircraft Corp.*, 725 F. Supp. 821 (D.N.J. 1989), aff'd 912 F.2d 67 (3rd Cir. 1990). The first element of the government contractor defense may be satisfied as a matter of law when the contractor incorporates government specifications into a design that the government subsequently reviews and approves. *Smith v. Xerox*, 866 F.2d 135, 138 (5th Cir. 1989); *In Re Aircraft Litigation Frederick, Maryland*, 752 F. Supp. 1326, 1337 (S.D. Ohio 1990); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989).

For example, in *Smith v. Xerox, supra*, the alleged defect was inadequate waterproofing of the equipment,

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[7] The underlying facts in *Stout* are a mirror image of those in the instant case. The evidentiary record established in the lower courts in support of WesTech's government contractor defense contains the same elements referred to by the *Stout* court in the holding quoted above. Further, the record in this case, just as in *Stout*, contains ample evidence of critical Navy review of Western Gear's work and dialogue with Western Gear concerning that work, all of which was ultimately controlled by the Navy. WesTech showed the lower court with respect to the ram tensioner, just as Fairchild demonstrated with respect to the air conditioning unit in *Stout*, that the Government fully participated in the various stages of the product's development.

and the court did not address whether the waterproofing procedures utilized were affirmatively required by the specifications. The *Smith* court held that the government contractor defense was applicable because the government approved reasonably precise specifications *for general environmental criteria,* despite the lack of any evidence that the defendant was prohibited from including devices to prevent the accumulation of moisture in the equipment (even though such devices had been included in a related system also manufactured by the same defendant).

Similarly, in *Harduvel v. General Dynamics,* 878 F.2d 1311 (11th Cir. 1989), the court held that the government contractor defense was applicable to a claim of defective design of electrical wiring in an aircraft manufactured for the Air Force. The court stated that "where a defect is one inherent in the product or system that the government has approved, it will be covered by the defense." *Id.,* at 1317. Further, the court held that in order to invoke the government contractor defense, *the only showing required by the contractor is that the government approved reasonably precise specifications,* and that such a showing is made when the contractor incorporates general government performance specifications into a design that the government subsequently approves. *Id.,* at 1320. (emphasis added)

In *Nicholson v. United Technologies Corp.,* 697 F. Supp. 598 (D.Conn. 1988), plaintiff alleged that a government contractor failed to provide adequate warnings in a maintenance manual for military equipment. The district court held that the government contractor defense applied, even though the warnings were not affirmatively

required, as the government was involved in the development of the manual and approved the contents thereof. *Id.* The court noted " . . . government contractor is not under a duty to provide every known safety device where it is not called for by the government contract [and] the choice is that of the government." *Id.*, at 603-604. See also, *Wilson v. Boeing Co.*, 655 F. Supp. 766, 773 (E.D. Pa. 1987) (specifications silent as to the alleged deficiency; lack of any evidence showing the specific consideration of this design omission does not preclude defendants from satisfying the requirement that the U.S. Government had approved "reasonably precise specifications," as it was sufficient that the overall detailed specification was established or approved by the Government).

As previously stated, the New Jersey Supreme Court relies on *In re: Joint Asbestos Litigation, supra,* 897 F.2d 626, and on *Dorse v. Eagle-Picher Industries, Inc., supra,* 898 F.2d 1487, for the proposition that the government must have exercised discretion specifically as to the safety-related issue in question for the government contractor defense to apply. These cases are inapposite to the instant case.

If the reasoning set forth in these cases is adopted, the government contractor defense would be restricted to the most limited of circumstances. There would simply be no discretion or delegation if the government was required to provide each and every design detail in the specification while *also* therein explicitly rejecting each and every potential alternative. To take plaintiff's argument to its logical conclusion, even though a particular design conformed to the government specifications and was approved by the government, the defense would not

be available if there were alternate designs which were not affirmatively prohibited by the government. Certainly, this would nullify the government's discretion to choose a particular design without specifically rejecting others.

It is clear from *Boyle*, and a majority of the cases applying the government contractor defense as established therein, that there is no requirement that a contractor demonstrate that the specific design deficiency alleged in the case is required or prohibited by government specifications. Simply put, the government contractor defense is a three prong test. When those three elements are satisfied by the government contractor, liability cannot be imposed by state law as a matter of law.

III. THERE ARE NO ALTERNATIVE NON-FEDERAL GROUNDS FOR THE DECISION BELOW.

There are no alternative or independent non-federal grounds for the decision below. The Court below upheld summary judgment in the trial court insofar as it adjudicated the three prongs of the *Boyle* test and the alternative bases for liability which were not at issue in the appeal. Rather, it adopted its own additional requirement for the government contractor defense and applied that formulation to affirm the reversal of the lower court's entry of summary judgment in favor of Petitioner WesTech, doing so "solely on the basis of a misapplication of the government contractor defense."

In addition, the federal question was timely raised in the trial court by Petitioner's answer to the complaint, in

which Petitioner asserted the government contractor defense as an affirmative defense.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this Petition.

Respectfully submitted,

TIM G. CEPERLEY
ROBYN K. JOHNSON

RODI, POLLOCK, PETTKER,
GALBRAITH & PHILLIPS,
A Law Corporation
801 South Grant Avenue,
Suite 400
Los Angeles, CA 90017
(213) 895-4900

Attorney for Petitioner
WesTech Gear Corporation

SUPREME COURT OF NEW JERSEY
A-69 September Term 1994

JOHN ANZALONE,

Plaintiff-Respondent,

v.

WESTECH GEAR CORPORATION (formerly known as or as successor to WESTERN GEAR CORPORATION),

Defendant-Appellant,

and

"JOHN DOE" GEAR CORPORATION" (a fictitious name being any presently unknown manufacturer or distributor of the gear mechanism causing injury to the plaintiff; "JOHN SMITH" INSTALLATION CORPORATION (a fictitious name being any presently unknown installer of the gear mechanism causing injury to the plaintiff),

Defendants.

Argued November 29, 1994 – Decided July 26, 1995

On certification to the Superior Court, Appellate Division, whose opinion is reported at 271 *N.J. Super.* 522 (1994).

Thomas T. Chappell argued the cause for appellant.

Maurice H. Connelly argued the cause for respondent.

PER CURIAM

The members of the Court being equally divided, the judgment of the Appellate Division is affirmed.

JUSTICE HANDLER has filed a separate concurring opinion, in which CHIEF JUSTICE WILENTZ and JUSTICE STEIN join. JUSTICE POLLOCK has filed a separate dissenting opinion, in which JUSTICES O'HERN and GARIBALDI join. JUSTICE COLEMAN did not participate.

SUPREME COURT OF NEW JERSEY
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JOHN ANZALONE,

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WESTECH GEAR CORPORATION (formerly known as or as successor to WESTERN GEAR CORPORATION),

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"JOHN DOE" GEAR CORPORATION" (a fictitious name being any presently unknown manufacturer or distributor of the gear mechanism causing injury to the plaintiff; "JOHN SMITH" INSTALLATION CORPORATION (a fictitious name being any presently unknown installer of the gear mechanism causing injury to the plaintiff),

Defendants.

HANDLER, J., concurring.

This is a products-liability case in which a civilian employee of the United States Navy was injured on shipboard by a device supplied to the Navy by a federal government contractor. The employee brought this action against the contractor, contending that the device, called a "ram tensioner," was defectively designed in that it did not have safety features that could have prevented such accidents and, therefore, the contractor is liable for that design defect under the state common-law duty to provide safe products. The contractor, invoking the government contractor defense, denies liability because the ram tensioner had been designed and manufactured without any safety features in strict conformance with specific and detailed government specifications, which preempt any contrary state-law duty.

The trial court, concluding that the government contractor defense was applicable, entered summary judgment in favor of the contractor. On appeal, the Appellate Division disagreed and reversed the lower court judgment. 271 *N.J. Super.* 573 (1994). The contractor filed a petition for certification, which this Court granted. 137 *N.J.* 314 (1994). The sole issue for the Court's determination is the applicability of the government contractor defense.

I

Plaintiff John Anzalone was a civilian employee of the United States Navy working as a steward aboard the USNS Waccamaw, a naval tanker used for transporting fuel and supplies to vessels at sea. On March 20, 1987, he

was engaged in a fuel-replenishment operation in which the ram tensioner was used. The function of the ram tensioner was explained by the Appellate Division:

> During a typical replenishment operation, a wire rope known as a "spanwire" or "highline" extends from the delivering ship to the receiving ship to provide support for connecting fuel and supply lines. The spanwire is reeved through a ram tensioner, which contains a series of pulleys at both ends of a vertical column (collectively termed the upper and lower sheave block or assembly). It is operated by a hydraulic ram to maintain constant tension on the spanwire by either "paying out" or "taking in" the spanwire so as to prevent supply lines from falling into the water.
>
> [271 *N.J. Super.* at 524-25.]

While walking near the open and unguarded lower sheave block of the ram tensioner, Anzalone tripped and, falling forward, reached out and grabbed with his left hand one of the spanwires that was being fed vertically downward from the upper sheave assembly. As the spanwire passed through the lower sheave block, Anazlone's [sic] left hand was partially amputated. *Id.* at 525.

Anzalone filed a complaint against defendant WesTech Gear Corporation (WesTech) in the Superior Court of New Jersey, Hudson County Division, seeking damages for his injuries. The complaint alleged that the ram tensioner had been negligently and defectively designed and manufactured by defendant, then known as Western Gear Corporation, and, consequently, WesTech was liable because it had distributed and installed the ram tensioner. WesTech answered the complaint, asserting that

the ram tensioner had been designed and furnished in accordance with government specifications, and, therefore, recovery was barred by the government contractor defense as enunciated by the United States Supreme Court in *Boyle v. United Technologies Corp.*, 487 *U.S.* 500, 108 *S. Ct.* 2510, 101 *L. Ed.* 2d 442 (1988).

The trial court determined, on defendant's motion for summary judgment, that the government contractor defense was available to WesTech because the design of the ram tensioner, which did not provide for any safety features with respect to lower sheave assembly, conformed to detailed and specific specifications approved by the government. 271 *N.J. Super.* at 528. The Appellate Division, however, reversed the judgment of the trial court, concluding that the government contractor defense was not applicable because WesTech was not prohibited by the terms of its contract specifications from including safety devices on the lower sheave assembly of the ram tensioner. *Id.* at 537.

Substantially for the reasons set forth in the opinion of Judge Petrella, we affirm the judgment of the Appellate Division. We hold that the government specifications, according to which the ram tensioner was designed, manufactured and supplied, did not impose any requirements that would conflict with the duty of the contractor under state law to provide a product that incorporated a safety feature for the lower sheave assembly of the ram tensioner, and, hence, the government contractor defense is not applicable as a bar to defendant's liability.

II

The government contractor defense was formulated by the United States Supreme Court in the *Boyle* case. There, a U.S. Marine helicopter copilot was killed when his helicopter crashed off the Virginia coast during a training mission. He drowned because he was unable to escape from the helicopter when water pressure sealed the craft's outward-opening emergency escape hatch. *Id.* at 502, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 451.

The victim's father sued the manufacturer of the helicopter, under Virginia tort law, alleging that the manufacturer was liable for his son's death in failing to build an inward-opening escape hatch. *Id.* at 502-03, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 451-52. The government's specifications for the helicopter provided for an outward-opening escape hatch. *Id.* at 509, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 456. A jury found for the plaintiff. *Id.* at 503, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 452. On appeal, the Court of Appeals for the Fourth Circuit reversed and remanded, holding that, as a matter of federal common law, the manufacturer could not be held liable for the alleged design defect in the escape hatch because it had met the requirements of the military contractor defense. *Ibid.* The United States Supreme Court vacated and remanded. *Id.* at 514, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 459.

The Supreme Court recognized that although the government contractor defense serves to preempt state tort law, the defense need not be based on legislation immunizing government contractors from liability for defective products under state law. Acknowledging that federal preemption of state law in most situations

requires a clear statutory prescription or a direct conflict between federal and state law, the Court observed that preemption can also arise when an area is expressly committed to federal control. When an area is "so committed by the Constitution and laws of the United States to federal control," federal courts may replace state law with "federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called 'federal common law.' " *Id.* at 504, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 452-53 (citation omitted).

Federal government contracting is an area that is clearly committed to federal control and raises special federal concerns. *Id.* at 504, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 453 (citation omitted). A military contractor fulfilling a procurement contract is similar to a federal official performing governmental duties because both "obviously implicate[ ] the same interest in getting the Government's work done." *Id.* at 505, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 453. Hence, a suit against a private party involving a military contract raises two "uniquely federal interests": the civil liability of federal officials for actions taken in the course of their duties and the government's rights and obligations under its contracts. *Id.* at 504-05, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 452-53.

The Supreme Court stressed, however, that the presence of a federal interest alone was not reason enough "for the displacement of state law." Rather,

> [d]isplacement will occur only where . . . a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law," or the application of state law would

"frustrate specific objectives" of federal legislation.

> [*Id.* at 507, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 454-55 (citations omitted).]

The Supreme Court further recognized, in the context of military procurement, the need for a "limiting principle" in determining the existence of a "significant conflict" between federal and state interests. *Id.* at 509, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 456. It found that "limiting principle" in the discretion that inheres in federal government procurement.[1] 487 *U.S.* at 511, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 457. The design of equipment, the Court pointed out, "often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Id.* at 511, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 457. "It makes little sense," the Court added, "to insulate the Government against financial liability for the judgment that a particular feature of military equipment

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[1] That discretion was analogized to the "discretionary function exception" to the Federal Tort Claims Act (FTCA), which, the Supreme Court felt, adequately set the parameters of a "significant conflict" between federal and state law in the context of federal government procurement. *Id.* at 511, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 475. That exception to the FTCA, 28 U.S.C. § 2680(a), applies to

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> [28 U.S.C. § 2680(a).]

is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 457-58.

The Supreme Court thus concluded that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id.* at 512, 108 *S. Ct.* at ___, 101 *L. Ed.* 2d at 458. To identify those circumstances in design-defect cases, the Court formulated a three-part test:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.
>
> [*Id.* at 512, 108 *S. Ct.* at 2518, 101 *L. Ed.* 2d at 458.]

The Court further amplified the reasons for this test:

> The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the

> contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.
>
> [*Id.* at 512-13, 108 *S.Ct.* at 2518-19, 101 *L. Ed.* 2d at 458.]

Many, if not most, design-defect cases, in which the government contractor defense is raised, determine the existence of a "significant conflict" by resort to the three-part test of *Boyle*. *E.g.*, *Harduvel v. Gen. Dynamics Corp.*, 878 *F.*2d 1311 (11th Cir. 1989), *cert. denied*, 494 *U.S.* 1030, 110 *S. Ct.* 1479, 108 *L. Ed.* 2d 615, *reh'g denied*, 495 *U.S.* 942, 110 *S. Ct.* 2199, 109 *L. Ed.* 2d 525 (1990); *Smith v. Xerox Corp.*, 866 *F.*2d 135 (5th Cir. 1989). As stated in *In re Aircraft Crash Litigation Frederick, Md.*, 752 *F. Supp.* 1326 (S.D. Ohio 1990), *aff'd sub nom. Darling v. Boeing Co.*, 935 *F.*2d 269 (6th Cir. 1991):

> [W]here the three *Boyle* elements are satisfied, a military contractor is entitled to immunity from suit under state tort law. If state law would impose liability where the three *Boyle* elements are met, the requisite "significant conflict" is present, and state law is preempted.
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> [*Id.* at 1336.]

One design-defect case, *Lewis v. Babcock*, 985 *F.*2d 83 (2d Cir.), *cert. denied*, ___ *U.S.* ___, 113 *S. Ct.* 3041, 125 *L. Ed.*2d 727 (1993), considered whether a "significant conflict" requires an antecedent showing of a significant conflict before application of the three-part *Boyle* test. In that case, Lewis was seriously injured in a jet fighter accident during training. He sued the manufacturer of

one of the plane's components, the malfunction of which allegedly caused the accident. Lewis argued that the *Boyle* three-part test did not come into play until the defendant first shows a significant conflict between the requirements under the federal contract and state tort law. The court rejected that analysis and concluded that the determination of a "significant conflict" is part of the *Boyle* test and not a prerequisite to it. *Id.* at 86. It stated that "[t]he purpose of the first part of the test, approval of reasonably precise specifications, is to determine whether a conflict with state law exists at all." *Ibid.* Drawing from *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 *F.*2d 626 (2d Cir. 1990) ("*Grispo*"), the court further noted,

> [A] federally imposed contract requirement displaces only a parallel state law requirement. If the Government did not approve reasonably precise specifications for the design feature in question, there is no conflict with state law. On the other hand, if the Government did approve such specifications, conflicting state tort law is preempted. Thus, answering the question whether the Government approved reasonably precise specifications for the design feature in question necessarily answers the question whether the federal contract conflicts with state law.
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> [985 *F.*2d at 86.87 (footnote and citation omitted).]

We concur in the reasoning of those courts that find the operative standard for determining whether a significant conflict exists to justify the preemption of state liability law is that expressed by the three elements of the

Boyle test. The question, then, that must be answered in this case is whether there is a "significant conflict" between our State's products-liability law applicable to design defects and the federal government's procurement policy as reflected in the government's contract specifications, according to which the ram tensioner was designed and supplied. The answer to that question must ultimately focus on whether such a conflict, if any, relates to the presence or absence of safety features as an important characteristic in the government-approved design of the ram tensioner.

III

In applying the *Boyle* test for preemption, we must determine basically whether the ram tensioner was designed in conformity with "reasonably precise specifications" that were "approved" by the federal government. The Appellate Division fully recapitulated the content of those specifications and the circumstances surrounding their formulation and application. 271 *N.J. Super.* at 525-28.

A. Martin Hanke, a Navy engineer from 1941 to 1973, originated the concept of the ram tensioner. 271 *N.J. Super.* at 525. According to his certification, the Navy awarded the first contract for design and development to Sancor Corporation in 1958. *Ibid.* On August 7, 1961, after testing and evaluating the Sancor ram tensioner at sea, the Navy drafted specification SHIPS-T-3945. *Ibid.*[2] Based

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[2] The specifications were set forth in Bureau of Ships Contract Specification, Tensioner, Hydraulic Ram (SHIP-T-3934),

on that specification and the final Sancor drawings, the Navy issued a procurement request that sought proposals for the development, manufacture, and testing of seventy-eight hydraulic ram tensioners. *Id.* at 526. The Navy subsequently awarded defendant the contract to manufacture the ram tensioners. *Ibid.*

Charles S. Forve was the defendant's manager of contracts and special products, and had been employed by defendant since 1968. *Ibid.* Forve certified that a subcontractor for WesTech provided the Navy with the ram tensioner in either late 1963 or early 1964. *Ibid.* He stated that "[a]ll of the ram tensioners provided to the Navy or Naval suppliers by Western Gear/WesTech were manufactured in accordance with strict written military specifications." *Ibid.* Furthermore, according to Hanke, the "ram tensioner was a piece of U.S. Navy deck machinery, conceived and developed by the Navy at Navy expense, and its design and application on U.S. Navy ships was completely controlled by the U.S. Navy." *Id.* at 527.

R.T. Hawley worked at WesTech from 1939 to 1979 and was chief engineer primarily responsible for the development and manufacture of ram tensioners for installation on naval ships. *Ibid.* He certified that "[t]he installation of ram tensioners and the positioning of ram tensioners within the fuel replenishment system was done by the Navy with absolutely no involvement on the part of Western Gear." *Id.* at 528. Hanke similarly indicated that the contractor "had no authority to install the

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published August 7, 1961. The specification also appear at MIL-T-2333a(SHIPS), June 27, 1962. The two versions are substantially the same.

ram tensioners it provided and had absolutely no input as to the placement of a ram tensioner within [a replenishment] configuration;" rather, the "[i]nstallation and arrangement of the ram tensioner was the sole responsibility of the Navy and the ship builder." *Id.* at 527.

The specifications thus were formulated and approved by the federal government. Further, the ram tensioner was manufactured and supplied in conformity with those specifications, and it was installed under the control and direction of the federal government. Most importantly, the specifications included requirements for all materials; the type of sheaves to be used; the bearings for the sheaves; stress calculations; requirements for size and weight; standards for the bedplate base assembly; provisions for the type of mesh screen in a handpump; the design, including material to be used, for the air-fluid accumulator, the ram cylinder assembly, and the control block assembly; measurements and material for the storage tank; and the finish to be used on all parts. In sum, the specifications for the ram tensioner were very detailed and specific.

The Supreme Court's decision in *Boyle* indicates that "reasonably precise specifications" alone do not establish a "significant conflict" between the federal government's contractual interests and the state's interests under its tort laws. Notwithstanding reasonably detailed specifications, a "significant conflict" would not arise if, as stated in *Boyle*, "the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed." *Id.* 487 *U.S.* at 509, 108 *S.Ct.* at 2516-17, 101 *L. Ed.* 2d at 455-56. If it is

possible for the contractor to "comply with both its contractual obligations and the state-prescribed duty of care[, n]o one suggests that state law would generally be preempted in this context." *Ibid.* "Stripped to its essentials, the military contractor's defense under *Boyle* is to claim: 'The Government made me do it.' " *Grispo, supra,* 897 *F.*2d at 632.

Conversely, as expressed in *Lewis, supra,* "If the Government did not approve reasonably precise specifications for the design feature in question, there is no conflict with state law." 985 *F.*2d at 86. *Boyle* itself pointed out that no "significant conflict" would exist if under state law, "a duty of care to include a certain safety feature" was neither "contrary" nor "identical to anything promised the Government," so that "the contractor could comply with both its contractual obligations and the state-prescribed duty of care." 487 *U.S.* at 508-09, 108 *S. Ct.* at 2516-17, 101 *L. Ed.* 2d at 456-57.

The helicopter specifications considered in the *Boyle* case presented a prototypical situation in which compliance with both duties was impossible, and thus presented a significant and irreconcilable conflict between federal and state interests. The Court observed:

> Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner [Boyle] claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).

[*Id.* at 509, 108 *S.Ct.* at 2517, 101 *L. Ed.* 2d at 456].

In this case, however, we are not confronted with "precisely contrary" duties with respect to a specific characteristic or safety feature of the product. Significantly, the specifications for the ram tensioner omitted any safety features relating to the sheave block and the spanwire that could have prevented the accident. Literally, the specifications neither required nor prohibited the inclusion of such a safety feature. Thus, in this case, it does appear, in the language of *Boyle*, that "the duty sought to be imposed on the contractor" – the inclusion of a safety feature on the ram tensioner – "is not identical to one assumed under the contract" or "promised the Government," nor is it "contrary to any [duty] assumed."

Nevertheless, the literal application of specifications is not the key to whether there is a "significant conflict." The omission of a specification does not automatically negate the existence of a significant conflict between design-defect liability under state tort law and the federal government's procurement policies. Such a conflict would arise if it could be shown that the "design feature in question" – here, the omission or the absence of a safety feature – was itself "considered by a Government officer," and thus falls "within the area where the policy of the 'discretionary function' would be frustrated." *Boyle, supra,* 487 *U.S.* at 512, 108 *S. Ct.* at 2518-19, 101 *L. Ed.* 2d at 458. *See Harduvel, supra,* 878 *F.*2d 1311 (reversing jury verdict in favor of widow of fighter pilot who died in training exercise, in which plaintiff asserted that "wire chaffing" or a massive electrical failure had caused the

fatal crash of F-16 aircraft; ruling that government contractor defense applied because the government had focused meticulous consideration and exercised discretion over the entire electrical system); *see also Kleeman v. McDonnell Douglas Corp.* 890 F.2d 698, 700-01 (4th Cir. 1989), *cert. denied*, 495 U.S. 953, 110 S. Ct. 2219, 109 L. Ed. 2d 545 (1990) (affirming summary judgment for contractor sued by plaintiffs for defective landing gear of a F/A-18 fighter jet; noting, further, extensive government participation and intimate involvement in the planning, development and approval of the feature involved in alleged design defect).

The omission of any specification covering a particular feature of a product alters the inquiry into whether the imposition under state law of a specific requirement with respect to that feature will create a significant conflict with government-procurement policies. That is exemplified in products-liability cases based on a failure to warn. In *Dorse v. Armstrong World Industries, Inc.*, 716 F. Supp. 589 (S.D.Fla. 1989), *aff'd o.b.*, 898 F.2d 1487 (11th Cir. 1990), the court determined that the government contractor defense did not apply because there was no conflict between a state-law duty to warn and compliance with the government specifications. The Eleventh Circuit reasoned that, in contrast to the situation facing the Supreme Court in *Boyle*, in its case

> specifically, the state-imposed duty of care that is the asserted basis of the contractor's liability (warning of the danger) is not "precisely contrary" to the duty imposed by the government contract (the duty [to] manufacture and deliver

> cement containing asbestos). In fact, the evidence suggests that *no* conflict exists between the state tort duty and the federal contractual duty. The defendant's exhibit of Navy Department specifications does not contain any prohibition against health warnings on the product. * * * "The contractor could comply with both its contractual obligations and the state-prescribed duty of care." *Boyle*, 108 S. Ct. at 2516. State law cannot be displaced in this context.
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> [898 *F.*2d at 1489-90.]

See Garner v. Santoro, 865 *F.*2d 629 (5th Cir. 1989) (remarking on "the difficulty that a defendant will have under *Boyle* in establishing an identifiable federal interest or policy in the existence or methods of warning and a significant conflict between federal interest or policy and the operation of state law."); *In re Hawaii Fed. Asbestos Cases v. Raymark Indus., Inc.*, 969 *F.*2d 860 (9th Cir. 1992) (holding there was "no conflict between [defendants'] state law duty to provide adequate warnings to the users of their insulation and the conditions imposed on them pursuant to the agreements they had entered into with the Government"); *Glassco v. Miller Equip. Co., Inc.*, 966 *F.*2d 641, 643-44 (11th Cir. 1992) (finding government contractor defense inapplicable to manufacturer who failed to warn government and end users that a leather belt would have a limited useful life because there was no significant conflict between the government specifications and the state-imposed duty to warn); *In re New York City Asbestos Litig.*, 144 *Misc.*2d 42, 542 *N.Y.S.*2d 118, 121 (N.Y. Sup. Ct. 1989) (holding that because military specifications for asbestos products said practically nothing

about health warnings, manufacturer could have complied with both specifications and duty to provide adequate warnings on the packages without frustrating any identifiable federal interest).

Some courts have concluded that the government contractor defense, though originating with *Boyle*, a design-defect case, is applicable in failure-to-warn cases. *E.g., Lewis v. Babcock, supra* (determining that *Boyle* applied not only to design defect suits, but also to failure-to-warn claims); *Garner v. Santoro, supra*, 865 F.2d at 625 (holding, after analyzing *Boyle*, that the contractor defense can be applied in a failure-to-warn case); *Dorse v. Armstrong World Indus., Inc., supra*, 716 *F.Supp.* 589 (determining that although the contractor defense expressed by *Boyle*'s three-part test itself is limited to design-defect cases, the reasoning underpinning *Boyle* applies in the failure-to-warn context); *cf. Harduvel, supra*, 878 F.2d at 1317 (*Boyle*, by its terms, applies only to defects in design); *Nicholson v. United Technologies Corp.*, 697 *F. Supp.* 598, 604 (D. Conn. 1988); *Neimann v. McDonnell Douglas Corp.*, 721 *F. Supp.* 1019, 1024-25 (S.D. Ill. 1989). We have recognized the parallel between the duty to provide a safe product with adequate warnings and the duty to provide a product that is safely designed. *Feldman v. Lederle Lab.*, 97 *N.J.* 429, 449 (1984) (noting that defect in product giving rise to strict liability may take the form of manufacturing flaw, design defect, or inadequate warning). *See Grispo, supra*, 897 F.2d 626, 637 ("Defects in product manufacturing and design and failure to warn of product hazards are all of a piece under the general rubric of strict products liability") (citation omitted) (Miner, J., concurring)).

The failure-to-warn cases are instructive because they often involve the omission of any specification pertaining to the feature in question, namely, a warning. In that context, the duty to warn imposed under state tort law will not pose a duty that is "precisely contrary" to the requirements of the government specifications. Consequently, the analysis necessary to determine the existence of a significant conflict shifts to whether that omission itself was the result of a conscious and purposeful decision and, therefore, reflects the exercise of discretion by the government. Thus, in *Grispo*, the Navy had issued instructions pertaining to the packaging, packing, and labeling of the asbestos-based cement product that had been supplied by a contractor. The court ruled:

> The contractor must show that whatever warnings accompanied a product resulted from a determination of a government official, *see Boyle* [487 *U.S.* at 512], 108 *S.Ct.* at 2518 ("feature in question [must be] considered by a Government officer, and not merely by the contractor itself"), and thus that the Government itself "dictated" the content of the warnings meant to accompany the product. *See Nicholson*, 697 *F. Supp.* at 604. Put differently, under *Boyle*, for the military contractor defense to apply, government officials ultimately must remain the agents of the decision.
>
> [*Id.* at 630.]

* * *

Boyle displaces state law only when the Government, making a discretionary, safety-related military procurement decision contrary to the

> requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion.
>
> [*Id.* at 632.]

See also Jackson v. Deft, Inc., 233 *Cal. Rptr.* 214, 221 (Ct. App. 1990) (stressing in failure-to-warn case that although "certain warnings were required by the military specifications, * * * the specifications [did not] place any limitation on additional information from the manufacturers to users of their products").

We must thus consider in assessing the contractual significance of the failure to include any safety features in the specifications for the ram tensioner, whether the government made an affirmative and definite decision to exclude safety features from the lower sheave assembly of the ram tensioner and whether, therefore, the omission of any such specifications was an exercise of government discretion.

The record yields significant clues as to what the federal government considered important in the design of the ram tensioner and the lack of importance it ascribed to safety features. Forve stated explicitly that "[t]he military specifications for ram tensioners have never required guards for the lower sheave block of the ram tensioner." 271 *N.J. Super.* at 526. Although noting that the specifications "establish[ed] a pattern of detail and precision," Hanke stated that "[d]uring my tenure with the Navy, guards for the lower sheave blocks of ram tensioners

were never required by the specifications or the accompanying drawings in a procurement of ram tensioners." 271 *N.J. Super.* at 526.27.

As stated by the Appellate Division, "the record reasonably supports an inference that the government ignored any safety measures," and that "the very absence of any specific guidelines or criteria within the otherwise precise specifications evinces indifference on the part of the Navy regarding safety mechanisms." 271 *N.J. Super.* at 536. Thus, the absence of either an express prohibition or requirement for "any type of safety mechanisms or warnings on the ram tensioner" did not evidence a decision by the Navy "not to adopt safety devices or guards." *Id.* at 537. Hence, the omission from the specifications of any safety feature does not imply a definite or conscious decision to deal with the safety aspects of the device or reflect the exercise of discretion with respect to any of its safety features.

Moreover, the omission of any safety features relating to the lower sheave assembly of the ram tensioner does not appear to be a choice exercised by the government between or among possible safety features. In contrast, in *Nicholson v. United Technologies Corp., supra,* 697 *F. Supp.* 598, in which a civilian employee sued the manufacturer of the landing gear of a military helicopter, which exploded while he was repairing it, the trial court granted the defendant's motion for summary judgment. The court emphasized that plaintiff had asserted a failure to provide adequate warnings on repair and disassembly of the gear in the maintenance manual, rather than any separate or "independent duty to warn." The court reasoned:

> When the government provides or approves specifications of a product which calls for some safeguards but not others, the government contractor is not under a duty to provide every known safety device where it is not called for by the government contract . . . The choice is that of the government. The contractor is obliged to the government's decision. The same is undoubtably true if the government provides "reasonably precise" specifications for the contents of a maintenance manual. A contractor should not be held liable for deficiencies in the contents of a maintenance manual if the contents are dictated by the government.
>
> [*Id.* at 603-04.]

In addition, a significant conflict can arise from specifications that reflect a comprehensive control consciously exercised by the government over the design of the product that includes express consideration of a specific feature, even though the specifications do not make any provision for that feature. *E.g., Harduvel, supra,* 878 F.2d 1311. The design of the ram tensioner, however, indicates that government discretion was exercised over characteristics of the device other than safety. The specifications provide:

> The basic design objectives are that the equipment will meet the needs of the naval service and that the final product shall reflect the utmost in simplicity, have maximum reliability consistent with the state of the art, and be easy to install and maintain. The equipment shall be designed to withstand intermittent use over long periods of time under naval service conditions, without benefit of overhaul. The design

> shall include all possible features which will result in reliable and stable operation with reduced requirements for adjustment and alignment, reduced requirements for maintenance, and simplified maintenance, thus, reducing requirements for skilled personnel.

The record in this case discloses that the federal government was not concerned with the safety aspects of the ram tensioner or the need for provisions for safety features in the specifications. We thus fully agree with the Appellate Division, which found that "there is nothing in the record to indicate that the government exercised any discretion" with respect to safety devices, 271 *N.J. Super,* at 535.

IV

We determine from the record that a safety feature for the lower sheave assembly of the ram tensioner may be required as a matter of state law without posing a significant conflict with identifiable government interests. Several considerations support that determination: (1) such a safety feature is omitted from the specifications in that it is neither expressly required nor expressly prohibited; further, there are no specifications relating to the safety aspects of the lower sheave assembly; (2) the omission of such safety specifications is in the context of detailed and precise specifications, covering all of the important features of the product; the specifications were formulated, reviewed, considered and approved by the government; and (3) the objectives of the design of the product, reflected in the specifications, were functional efficiency, simplicity in operation and ease in installment

and placement; safety in the operation of the lower sheave assembly was neither a paramount nor an incidental concern in the design of the product. It is thus inferable than a safety feature that would overcome the risk of injury from the operation of the lower sheave assembly could be incorporated into the product without substantially affecting or modifying any of the features required by the express specifications and without impairing the basic objectives of the design of the ram tensioner. In other words, it appears that the contractor could have fulfilled its duty to the government and simultaneously complied with a state-law duty to render the product safe without infringing on the discretion exercised by the government.

Accordingly, we conclude that there is no significant conflict between federal interests reflected in the government contract specifications and state policies under its products-liability law. Consequently, the government contractor defense is inapplicable, and it may not be interposed to preempt or displace state law.

Chief Justice Wilentz and Justice Stein join in this opinion.

SUPREME COURT OF NEW JERSEY
A-69 September Term 1994

JOHN ANZALONE,

Plaintiff-Respondent,

v.

WESTECH GEAR CORPORATION (formerly known as or as successor to WESTERN GEAR CORPORATION,

Defendant-Appellant,

and

"JOHN DOE" GEAR CORPORATION (a fictitious name being any presently unknown manufacturer or distributor of the gear mechanism causing injury to the plaintiff; "JOHN SMITH" INSTALLATION CORPORATION (a fictitious name being any presently unknown installer of the gear mechanism causing injury to the plaintiff),

Defendants.

POLLOCK, J., dissenting.

I agree with the concurrence that "the operative standard for determining whether a significant conflict exists to justify the preemption of state liability law is that expressed by the three elements of the *Boyle* test." *Ante* at (slip op. at 11). The *Boyle* test provides immunity to military contractors in respect of design defects when (1) the federal government approved reasonably precise specifications, (2) the equipment conformed to those

specifications, and (3) the contractor warned the government about known risks. *Boyle v. United Technologies Corp.*, 487 *U.S.* 500, 512, 108 *S. Ct.* 2510, 2518, 101 *L. Ed.* 2d 442 (1988).

I disagree, however, with the concurrence's application of *Boyle* to this case. Unlike the concurrence, I believe that *Boyle* provides defendant WesTech Gear Corporation (WesTech) with the government contractor defense to the claim of plaintiff, John Anzalone. In my opinion, the concurrence has misinterpreted *Boyle*. Consequently, I dissent.

The concurrence has summarized the relevant facts pertaining to the design and manufacture of the ram tensioner that caused plaintiff's injuries: Mr. Hanke, a Navy engineer, originated the concept of the ram tensioner; Sancor Corporation, a Navy contractor, designed and developed the ram tensioner; Westech contracted to manufacture ram tensioners based on the Navy's detailed specifications that included Sancor's final drawings; the ram tensioner provided by Westech conformed to the Navy's specifications; and the Navy assumed complete control over the placement and installation of the ram tensioners. *Ante* at (slip op. at 12-14).

Those facts satisfy the first two prongs of the *Boyle* test. The concurrence candidly acknowledges that WesTech fabricated the ram tensioners based on "very detailed and specific" drawings. *Ante* at ___ (slip op. at 14). In addition, it admits that "the ram tensioner was manufactured and supplied in conformity with those specifications." *Ante* at ___ (slip op. at 13). Plaintiff, moreover, does not claim that WesTech failed to warn the

Navy of known risks. Yet, the concurrence infers that because the Navy did not explicitly forbid WesTech from installing a guard on the ram tensioner, WesTech had a duty to design and provide such a device. That inference stands *Boyle* on its head.

The Navy participated in the development of the ram tensioner and incorporated the detailed Sancor drawings into the Navy's specifications. Under *Boyle*, those facts reflect the Navy's determination of the appropriate balance "between greater safety and greater combat effectiveness." *See Boyle*, 487 *U.S.* at 511, 108 S. Ct. 2518, 101 *L. Ed.* 2d at 457. Yet, the concurrence holds that a government contractor who relies on that determination may be liable for resulting injuries. In *Boyle*, Justice Scalia perceived the problem with that approach. He warned:

> The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulated the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.
>
> [487 *U.S.* at 511-12, 108 *S. Ct.* at 2518, 101 *L. Ed.* 2d at 457-58.]

Justice Scalia then announced the three-part test for identifying those instances when a military contractor is entitled to immunity.

The flaw in the concurrence's analysis is that instead of applying the three-part *Boyle* test, it posits its own formula to determine whether the imposition of a duty on WesTech would create a "significant" conflict with the government's interests – precisely the question that *Boyle* answered. In effect, the concurrence would overrule the United States Supreme Court on an issue concerning the liability of contractors with the federal government.

To achieve that untoward result, the concurrence misconstrues *Boyle*. In that case, the Court stated in *dicta* that it could conceive of a case different from *Boyle*, "in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed." 487 *U.S.* at 509, 108 *S. Ct.* at 2517, 101 *L. Ed.* 2d at 455-456. The Court then provided two examples in which, unlike in the present case, the government had not participated in the design process. In the first hypothetical situation, the Court stated that:

> If, for example, the United States contracts for the purchase and installation of an air conditioning-unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary.
>
> [487 *U.S.* at 509, 108 *S. Ct.* at 2517, 101 *L. Ed.* 2d at 456.]

In the second hypothetical, which was similar to the facts of the *Boyle* case, the Court noted: "If, for example, a federal procurement officer orders, by model number, a

quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature." *Ibid.*

In both hypothetical cases, the manufacturer, not the federal government or another contractor hired by the government for that purpose, designed the potentially defective product. Here, in contrast, WesTech agreed to build the ram tensioner in accordance with precise specifications provided by the government.

The *Boyle* test expressly recognizes the inherent difference between a case in which a contractor designs and manufactures military equipment for the federal government and a case, such as the present one, involving the government's procurement of military equipment designed by, or in conjunction with, military engineers. The Court stated:

> The selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function. . . . It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments through state tort suits against contractors would produce the same effect sought to be avoided. . . . In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances

present a "significant conflict" with federal policy and must be displaced.

[487 *U.S.* at 511-12, 108 *S. Ct.* at 2518, 101 L. Ed.2d at 457-58 (citation and footnote omitted).]

The very purpose of the *Boyle* test was to define those "circumstances [involving military design and procurement that] present a 'significant conflict' with federal policy. . . . " 487 *U.S.* at 512, 108 *S. Ct.* at 2518, 101 *L. Ed.* 2d at 458.

If the United States Navy had manufactured the ram tensioner, it would be immune under the Federal Torts Claims Act, 28 *U.S.C.A.* 2680(a). To impose liability on WesTech for making a product for which the Navy would not be liable if it had made the product itself contravenes that legislative immunity. As the United States Supreme Court stated in *Boyle*. "[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." 487 *U.S.* at 512, 108 *S.Ct.* at 2518, 101 *L. Ed.* 2d at 457-58.

I would reverse the judgment of the Appellate Division and reinstate the summary judgment granted by the Law Division.

Justices O'Hern and Garibaldi join in this opinion.

638 A.2d 1365

JOHN ANZALONE, PLAINTIFF-APPELLANT, v. WESTECH GEAR CORPORATION, FORMERLY KNOWN AS OR AS SUCCESSOR TO WESTERN GEAR CORPORATION, DEFENDANT-RESPONDENT, AND "JOHN DOE" (A FICTITIOUS NAME); "JOHN SMITH" INSTALLATION COMPANY, (A FICTITIOUS NAME), DEFENDANTS.

Superior Court of New Jersey,
Appellate Division.

Argued Feb. 22, 1994. Decided March 25, 1994.

SYNOPSIS

Civilian, who was employed by United States Navy aboard naval tanker used for transporting fuel and supplies to vessels at sea, sued designer of "ram tensioner" component of fuel replenishment system used by tanker, for damages due to accident involving ram tensioner in which portion of civilian's left hand was severed. The Superior Court, Law Division, Hudson County, entered summary judgment for designer based on government contractor defense. Civilian appealed. The Superior Court, Appellate Division, Petrella, P.J.A.D., held that: (1) government contractor defense did not immunize designer from liability under state tort law, but (2) designer had no duty to install ram tensioner or inspect its position aboard ship.

Reversed and remanded.

Before Judges PETRELLA, CONLEY and VILLANUEVA.[1]

Maurice H. Connelly argued the cause for appellant (*Mr. Connelly,* on the brief).

Thomas T. Chappell argued the cause for respondent (*Robyn K. Johnson,* on the brief).

The opinion of the court was delivered by

PETRELLA, P.J.A.D.

Plaintiff John Anzalone appeals from a summary judgment order dismissing his complaint against defendant WesTech Gear Corporation (WesTech), formerly known as Western Gear Corporation. Anzalone asserts that the motion judge erroneously (1) applied the government contractor defense, and (2) determined that WesTech did not have either a contractually imposed or common law duty to install the ram tensioner or inspect its positioning aboard ship. We reverse solely on the basis of a misapplication of the government contractor defense.

During 1987, Anzalone, a civilian, worked for the U.S. Navy as a room steward aboard a naval tanker used for transporting fuel and supplies to vessels at sea. He apparently also had limited duties with respect to fuel replenishment operations undertaken by the tanker.

Transferring fuel and supplies between naval ships at sea involves an elaborate replenishment system consisting of numerous components, including a WesTech device

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[1] Judge VILLANUEVA did not attend oral argument but has participated in this appeal by consent of the attorneys.

known as a "ram tensioner." During a typical replenishment operation, a wire rope known as a "spanwire" or "highline" extends from the delivering ship to the receiving ship to provide support for connecting fuel and supply lines. The spanwire is reeved through a ram tensioner, which contains a series of pulleys at both ends of a vertical column (collectively termed the upper and lower sheave block or assembly). It is operated by a hydraulic ram to maintain constant tension on the spanwire by either "paying out" or "taking in" the spanwire so as to prevent supply lines from falling into the water.

On March 20, 1987, Anzalone (a Bayonne, New Jersey resident) was on the USNS Waccamaw off the Virginia coast,[2]and was on a fuel replenishment detail when he tripped while he was walking adjacent to the open and unguarded lower sheave block. As he fell forward, Anzalone reached out with his left hand and grabbed one of the spanwires as it was being fed vertically downward from the upper sheave assembly into the lower sheave block of the ram tensioner. As a result of the spanwire passing through the lower sheave block, Anzalone's left hand was amputated at mid-palm.

According to the certification of A. Martin Hanke, a Navy engineer from 1941 to 1973, who originated the concept of the ram tensioner, the Navy awarded the first contract for design and development to Sancor Corporation in 1958. On August 7, 1961, after testing and evaluating the Sancor ram tensioner at sea, the Navy drafted

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[2] Obviously jurisdiction in this state is grounded on the New Jersey residence of Anzalone. WesTech's attempt to remove the matter to the federal court was rejected.

specification SHIPS-T-3945, which provided in pertinent part:

> 3.2.6 *Sheaves.* – Sheaves shall be designed for one inch wire rope (breaking strength of 85,600 pounds). Means shall be provided to prevent the wire rope from jumping the sheaves.
>
> * * *
>
> 3.13 *Workmanship.* – Workmanship shall be of the highest quality commensurate with the intended use.

Additionally, Navy specifications provided in part:

> The Contractor shall furnish the services of a competent engineer(s) for checking and placing the hydraulic ram tensioners in a satisfactory operating condition. These services shall consist of assisting the yard in operating and testing the equipment and instructing yard and ship personnel in proper operation of the equipment. Due to the special nature of equipment involved these services are considered essential and special attention is invited to this requirement. The engineering services shall be performed within the limits as to places, if any, and period specified therefor, at specific places and times which shall be designated by the Chief, Bureau of Ships, Code 622A, or his duly authorized representative.
>
> * * *
>
> The Government may require less than the total amount of services set forth above be furnished. In such event or in the event that the Government does not designate times and places sufficient for the full performance of said total amount of services within the period provided

> therefor, those services not furnished shall be deemed to be terminated for the convenience of the Government at no cost to the Government.

Based upon specification SHIPS-T-3945 and the final Sancor drawings, the Navy issued a procurement request that sought proposals for the development, manufacture, and testing of seventy-eight hydraulic ram tensioners.[3] The Navy subsequently awarded WesTech, then known as Western Gear, the contract to manufacture the ram tensioners.

According to a certification of Charles S. Forve, employed by WesTech since 1966 and currently manager of contracts and special products, a subcontractor for WesTech provided the Navy with the subject ram tensioner in either late 1963 or early 1964. Forve further stated:

> All of the ram tensioners provided to the Navy or Naval suppliers by Western Gear/WesTech were manufactured in accordance with strict written military specifications. During my tenure at Western Gear/WesTech, the Navy never objected to any of the ram tensioners on the basis of nonconformity with military specifications. The military specifications for ram tensioners have never required guards for the lower sheave block of the ram tensioner.

Although stating that the SHIPS-T-3945 specification and Sancor drawings "establish[ed] a pattern of detail

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[3] According to a certification of R.T. Hawley, then chief engineer for WesTech, the procurement request had modified and supplemented specification SHIPS-T-3945.

and precision," Hanke also stated that the initial procurement for ram tensioners "did not require any guarding of the lower sheave block area." With respect to the upper and lower sheave blocks, Hanke further opined:

> In my experience at the Navy, its approval of drawings and proposals was never merely a stamp of approval without substantive evaluation; the Navy was always intimately involved with the design and development of all deck equipment and the design and development of the ram tensioner was no exception.
>
> * * *
>
> During my tenure with the Navy, guards for the lower sheave blocks of ram tensioners were never required by the specifications or the accompanying drawings in a procurement of ram tensioners.

According to Hanke, WesTech had suggested various design features for the ram tensioner that the Navy had challenged, modified, or rejected. As to the installation of the ram tensioners, Hanke said:

> The specifications provided to Western Gear for the production of ram tensioners often contained provisions which stated that the manufacturer was to provide engineering services in connection with the supply of the equipment. Such engineering services were performed only at the request of the Navy and Western Gear had no obligation to provide them unless the Navy requested and paid for those services under the option provided in the contract. Engineering services did not include installation, erection or arrangement of the ram tensioner.

> Installation and arrangement of the ram tensioner was the sole responsibility of the Navy and the ship builder; Western Gear had no authority to install the ram tensioners it provided and had absolutely no input as to the placement of a ram tensioner within [a replenishment] configuration.

In sum, Hanke believed that the "ram tensioner was a piece of U.S. Navy deck machinery, conceived and developed by the Navy at Navy expense, and its design and application on U.S. Navy ships was completely controlled by the U.S. Navy."

Additionally, R.T. Hawley, who worked at WesTech from 1939 to 1979, and was chief engineer primarily responsible for the development and manufacture of ram tensioners for installation on naval ships, outlined the various military specifications for the ram tensioner in his certification and added:

> The specifications further provide that the ram tensioner should reflect the utmost in simplicity and reliability, and that the ram tensioners should be easy to install and maintain with a minimum of skilled personnel. The specifications clearly provide that the ram tensioner subject to development was to be free standing, base mounted structure which could be placed anywhere upon a ship's deck.
>
> * * *
>
> [T]he specifications stated only that some means should be provided to prevent the wire rope from jumping the sheaves, and made no mention of guards for the ram tensioner or the lower sheave block in particular.

* * *

> The installation of ram tensioners and the positioning of ram tensioners within the fuel replenishment system was done by the Navy with absolutely no involvement on the part of Western Gear.

Although we conclude that summary judgment was improperly granted, we agree with the motion judge that no genuine issues of material fact exist. There is no dispute that (1) WesTech had designed and manufactured the ram tensioner, in conjunction with Navy engineers and specifications; (2) the Navy had approved and accepted the ram tensioner; (3) the ram tensioner, as supplied to the Navy by WesTech, had no safety warnings or devices protecting the lower sheave assembly (the Navy specifications neither expressly prohibited nor required such warnings or devices); and (4) for purposes of the summary judgment motion, and consequently this appeal, it may be assumed that WesTech did in fact negligently design the ram tensioner in question.

Our analysis begins with *Boyle v. United Technologies Corp.*, 487 *U.S.* 500, 108 *S.Ct.* 2510, 101 *L.Ed.2d* 442 (1988), a 5-4 decision wherein the United States Supreme Court addressed when a contractor providing military equipment to the federal government could be held liable under state tort law for an injury caused by a design defect. Boyle, a marine copilot, was killed when the helicopter in which he was flying crashed off the coast of Virginia. Although Boyle survived the crash, he subsequently drowned because he was unable to escape from the helicopter. His father brought suit against United Technologies Corporation, which built the helicopter,

asserting that it had defectively designed the copilot's emergency escape hatch because it opened outward instead of inward and, as such, was ineffective in a submerged craft due to water pressure.

Justice Scalia, writing for the Court, recognized that the suit implicated the "uniquely federal" interest involved in the procurement of equipment by the federal government, even though the dispute was one between private parties, *id.* at 505-506, 108 S.Ct. at 2514-2515, because "imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 507, 108 S.Ct. at 2515-2516.

Justice Scalia stated, however, that the presence of a uniquely federal interest did not end the inquiry, rather it merely established a necessary, not a sufficient, condition for the displacement of state law that:

> will occur only where, as we have variously described, a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law" or the application of state law would "frustrate specific objectives" of federal legislation. [*Ibid.* (citations omitted).]

The majority opinion distinguished *Miree v. DeKalb County*, 433 *U.S.* 25, 97 *S.Ct.* 2490, 53 *L.Ed.2d* 557 (1977), where the Court had refused to displace state law in a suit brought by certain private parties as third-party beneficiaries to an agreement between a municipality and the Federal Aviation Administration, reasoning that the suit brought there did not seek to impose upon the person

contracting with the government a duty contrary to the duty imposed by the government contract. Rather, it was the contractual duty itself that the third-party beneficiaries attempted to enforce, with any federal interest in the outcome being far too remote and speculative to justify the application of federal law.

In *dicta*, Justice Scalia discussed an intermediate situation where state law might apply:

> Between Miree and the present case, it is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed. If, for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context. [*Id.* 487 U.S. at 508-509, 108 S.Ct. at 2516-2517.]

With respect to the helicopter specifications involved in Boyle, he reasoned:

> Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner

> [Boyle] claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications). [*Id.* at 509, 108 S.Ct. at 2517.]

Justice Scalia added, however, that it would be unreasonable to say that there is always a "significant conflict" between the state law and a federal policy or interest, even in this sort of situation, providing the following example:

> If . . . a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered. [*Ibid.*]

Boyle then interpreted certain provisions in the Federal Tort Claims Act (FTCA) in an attempt to identify situations in which a "significant conflict" between federal interests and state law exists in the context of government procurement. *Id.* at 511, 108 *S.Ct.* at 2518. Specifically, *Boyle* relied upon 28 *U.S.C.A.* § 1346(b), which provides in pertinent part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government

> while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Court pointed out an exception to this general principle in 28 *U.S.C.A.* § 2680(a):

> Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Based upon these statutory provisions, Justice Scalia reasoned:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered

> designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced. [*Boyle* 487 *U.S.* at 511-512, 108 *S.Ct.* at 2518.]

Against this backdrop, *Boyle* set forth a three-prong test to determine the scope of displacement in design defect cases:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. [*Id.* at 512, 108 *S.Ct.* at 2518.]

The reasons for these conditions were set forth:

> The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law

> would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision. [*Id.* at 512-513, 108 *S.Ct.* at 2518-2519.]

Here, WesTech argues that the government contractor defense bars recovery because it had conformed with reasonably precise specifications for the equipment, which the military had reviewed and approved.

Anzalone counters that the government contractor defense does not apply because installation of a safety device or warning with respect to the lower sheave assembly would not have been precisely contrary to or prohibited by an affirmative military specification. He relies on *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir.1990), where three persons and a survivor of a fourth, who had worked at a Navy shipyard during World War II, brought a failure-to-warn cause of action against the manufacturer-supplier who furnished the Navy with an asbestos-based cement according to "fairly precise design and testing specifications, with the most important such specification mandating that the product contain a substantial concentration of asbestos." *Id.* at 627. The Navy also issued instructions pertaining to the product's packaging, packing, and labeling.

The Second Circuit initially determined that *Boyle* applied not only to design defect suits, but also to failure-

to-warn claims. *See Niemann v. McDonnell Douglas Corp.*, 721 F.Supp. 1019, 1024-1025 (S.D.Ill.1989); *Nicholson v. United Technologies Corp.*, 697 *F.Supp.* 598, 604 (D.Conn.1988). *But cf. Harduvel v. General Dynamics Corp.* 878 F.2d 1311, 1317 (11th Cir.1989) (*Boyle*, by its terms, applies only to defects in design), *cert. denied*, 494 *U.S.* 1030, 110 *S.Ct.* 1479, 108 L.Ed.2d 615 (1990).

In considering under what circumstances *Boyle* required displacement of a state law duty to warn, the Second Circuit in Asbestos *Litigation* reasoned:

> We agree with the district court that for [appellant] to establish that *Boyle* displaces any state law duty to warn, [appellant] must show that the applicable federal contract includes warning requirements that significantly conflict with those that might be imposed by state law. Moreover, it seems clear to us that *Boyle's* requirement of government approval of "reasonably precise specifications" mandates that the federal duties be *imposed* upon the contractor. The contractor must show that whatever warnings accompanied a product resulted from a determination of a government official, *see Boyle* [487 U.S. at 512], 108 S.Ct. at 2518 ("feature in question [must be] considered by a Government officer, and not merely by the contractor itself"), and thus that the Government itself "dictated" the content of the warnings meant to accompany the product. *See Nicholson*, 697 *F.Supp.* at 604. Put differently, under *Boyle*, for the military contractor defense to apply, government officials ultimately must remain the agents of decision. [*Id.* at 630.]

The court rejected the manufacturer's assertion that the government made a discretionary decision not to warn persons in the position of ship workers of the dangers they faced from coming in contact with asbestos:

> [Appellant], however, omits a crucial distinction between the discretionary function exception and the military contractor defense. Stripped to its essentials, the military contractor's defense under *Boyle* is to claim, "The Government made me do it." *Boyle* displaces state law only when the Government, making a discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion. [*Id.* at 632.]

Ultimately, although "not impressed" with the manufacturer's arguments opposing summary judgment, the court remanded for reconsideration of "whether the various Navy packaging, packing, and labeling requirements appearing in the record or the various editions of the Navy Shipment Marking Handbook establish a genuine issue of material fact that the Government might have precluded [appellant] from including any product warnings with the goods alleged to have injured the [appellees]." *Id.* at 637.

In *Dorse v. Armstrong World Industries, Inc.*, 716 *F.Supp.* 589 (S.D.Fla.1989), *aff'd o.b.*, 898 F.2d 1487 (11th Cir.1990), plaintiff brought a failure-to-warn cause of action in an asbestos case against a contractor. There, the Florida District Court distinguished between failure-to-warn and design defect suits, by stating:

> On the one hand, the court agrees with the defendant that *Boyle* is not strictly limited to design defect cases. The government contractor defense, for example, could arise when the government prohibits a specific warning. On the other hand, the court agrees with plaintiff that the three-part test of [*Boyle*] is necessarily limited to design defect cases. [*Id.* at 590.]

In order to resolve the "dilemma" of applying *Boyle* to a failure-to-warn cause of action, the court adopted its own two-prong test, and found that, despite the presence of a uniquely federal interest, there was no conflict "between the state tort duty and the federal contractual duty." *Id.* at 591.

Here, both *Asbestos Litigation* and *Dorse* support the proposition that to displace state tort law, WesTech must show that the government imposed certain contractual obligations upon it that had contravened or significantly conflicted with the operation of state law.

WesTech argues that these cases are distinguishable because their focus is the application of *Boyle* to claims based upon a state law duty to warn as opposed to state law concerning design defects. We disagree.

As stated in Judge Minor's concurring opinion in *Asbestos Litigation*:

> In an effort to distance the case at bar from *Boyle*, the majority notes a "contrast" between the design defect theory put forward by the plaintiff in *Boyle* and the "alleged failure to warn, a separate tort theory," *ante* at 629, put forward by the plaintiffs here. The distinction is hardly so sharp as to be called a "contrast,"

> however. Defects in product manufacturing and design and failure to warn of product hazards are all of a piece under the general rubric of strict products liability. *See generally* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 99, at 695-98 (5th ed. 1984). [*Id.* at 637 (Miner, J., concurring).]

See Feldman v. Lederle Laboratories, 97 *N.J.* 429, 449, 479 A.2d 374 (1984), (*Feldman* I) (defect in product giving rise to strict liability may take the form of manufacturing flaw, design defect, or inadequate warning).

Although there are cases that arguably support the position of WesTech, each is distinguishable. In *Kleemann v. McDonnell Douglas Corp.* 890 *F.2d* 698 (4th Cir.1989), *cert. denied*, 495 *U.S.* 953, 110 *S.Ct.* 2219, 109 *L.Ed.2d* 545 (1990), for instance, plaintiffs sued a contractor, alleging failure to conform with reasonably precise Navy specifications with respect to the landing gear of a F/A-18 fighter jet. In affirming summary judgment for the contractor, the court said:

> Plaintiffs' claim is precisely the sort for which the defense was intended. This is true both because of the nature of defendant's product and the characteristics of the process by which it was designed. At issue here is a discretionary decision involving military hardware in which the government was a substantial participant.
>
> * * *
>
> It is hard to imagine a matter more uniquely in the province of the military – and one less appropriate to second-guessing by civilian

> courts – than the development of a high technology, multi-mission aircraft.
>
> Similarly, the design details of the F/A-18 illustrate the balancing of military and technological factors, including "the trade-off between greater safety and greater combat effectiveness." [citation omitted] For example, the main landing gear at issue here had to absorb extremely high amounts of energy generated upon landing on a carrier. On the other hand, stowage of the gears could not interfere with external weapon storage. These competing concerns required a unique "levered gear" design to provide adequate distance between the extended right and left main landing gears and thereby ensure stability of the aircraft upon landing. The design, developed by MDC and approved by the Navy, employed a planning link assembly to deplane the wheels during retraction and extension of the landing gear. [*Id.* at 700-701 (citations omitted).]

After exchanging views in the procurement process with defendant, balancing military and technological factors, and maintaining "an extensive staff of aircraft engineers" on site at defendant's facilities, the Navy had exercised discretion regarding the landing gear to be used. *Id.* at 701. Against this backdrop, the court reasoned:

> It is this salient fact of governmental participation in the various stages of the aircraft's development that establishes the military contractor defense. Indeed, active governmental oversight is relevant to all three elements of defendant's burden. Where, as here, the Navy was intimately involved at various stages of the design

> and development process, the required governmental approval of the alleged design defect is more likely to be made out. [citations omitted] Similarly, the Navy's extensive participation, including reservation of the power to approve or disapprove design modifications, enhances the likelihood of final product conformity. Government involvement in the process also makes it more likely, though not certain, that a sharing of information will occur with respect to potential dangers in the use of equipment. [*Ibid.* (citations omitted).]

Here, unlike *Kleemann*, there are no specifications with respect to safety devices. There is nothing in the record to indicate that the government exercised any discretion in this regard, let alone balanced any technical or military considerations or shared information concerning potential dangers. Stated differently, plaintiff in *Kleemann* attacked as defective the very item upon which the Navy had exercised its discretion, *i.e.*, the landing gear. This is far different than the situation here, where Anzalone attacks a defect that the government specifications had not addressed and left to WesTech's discretion. Had the Navy required certain safety mechanisms, but not particularized any type of design, WesTech would then be able to argue that it had conformed with reasonably precise specifications even if it had not employed the safest device. That did not happen here, however.

Harduvel v. General Dynamics Corp., supra (878 *F.2d* 1311) is likewise distinguishable. In *Harduvel*, the widow of a fighter pilot who died in a training exercise brought suit against the manufacturer of the F-16 aircraft, asserting that "wire chaffing" or a massive electrical failure had

caused the fatal crash. A jury found defendant liable and awarded plaintiff and the deceased's estate a total of $3.1 million in damages. The Eleventh Circuit reversed, because the government had exercised discretion over the electrical system.

Here, however, the record reasonably supports an inference that the government ignored any safety measures. Furthermore, the *Kleemann* and *Harduvel* courts refused to equate failure to perform, *i.e.*, the landing gear in *Kleemann* and the electrical system in *Harduvel*, with an absence of conformity. There is an obvious absence of conformity with reasonably precise specifications here because no guidelines or specifications exist with respect to safety devices or measures.

More importantly, WesTech cannot be accorded immunity here based upon the government contractor defense because it could have fulfilled both its contractual obligation to the government and a state-prescribed duty of care,[4] as it is abundantly clear that no significant conflict exists between them. Although a conflict alone will not suffice to displace state law, the absence of one certainly precludes pre-emption by so-called federal common law, as stated by Justice Scalia, "[b]ut conflict there must be." Thus, the Navy did not make WesTech do anything – it chose not to provide any safety measures or

---

[4] We recognize the potential theoretical problem of different state law applications dependent upon the residence of an injured plaintiff where the injury occurs outside the jurisdiction. In the absence of a controlling authority, however, a state court can apply appropriate conflict of law criteria. Since the issue has not been raised or briefed, we merely note the problem.

warnings and, in the absence of such significant conflict, state tort law applies.

Nor can WesTech claim that the Navy imposed a significant conflict by deciding not to adopt safety devices or guards because the government neither expressly prohibited nor required any type of safety mechanisms or warnings on the ram tensioner in question. Indeed, the very absence of any specific guidelines or criteria within the otherwise precise specifications evinces indifference on the part of the Navy regarding safety mechanisms.

Moreover, since the Navy did not exercise any discretion with respect to safety measures, it cannot be said now that it is being "second-guessed" or its governmental discretion is being infringed upon because it never considered the issue in the first place. Finally, WesTech cannot establish that in making its decisions concerning safety devices it had been acting in compliance with reasonably precise specifications because there were no such safety specifications set forth.

Anzalone's assertion that WesTech had either a contractual or common law duty to install the ram tensioner or inspect its positioning aboard ship is without merit. The naval specifications simply do not contain any provision that required WesTech to "install" the ram tensioners it sold to the Navy. Even if they did, the Navy had the authority to depart from such specifications. In any event, based on the record, WesTech was not involved with the installation of the particular ram tensioner.

Reversed and remanded for further proceedings consistent herewith.

ORDER ON MOTION

JOHN ANZALONE
VS
WESTECH GEAR CORP ET AL

MOTION NO.	M-004772-93
BEFORE PART:	C
JUDGE(S):	PETERELLA CONLEY VILLANUEVE

MOTION FILED: APRIL 04, 1994
BY: WESTECH GEAR CORP.
ANSWER(S) FILED:

SUBMITTED TO COURT: APRIL 27, 1994

ORDER

(Filed May 5, 1994)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 2ND DAY OF MAY, 1994, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT
- FOR RECONSIDERATION

GRANTED	DENIED	OTHER
( )	(X)	(X)

SUPPLEMENTAL:

Although the motion is denied, we add the following brief comments. WesTech in its motion brief mischaracterizes our statement regarding the absence of safety warnings or devices protecting the lower sheave assembly of the ram tensioner. We simply referred to the undisputed

fact that the ram tensioner as supplied to the Navy by WesTech had no safety warnings or devices. We did not implicate or discuss any signs placed by the Navy, but limited our statement to the subject ram tensioner as provided to the Navy by WesTech. To make it clearer that this was our intent, page 7 of the March 25, 1994 opinion is amended and a new page will be furnished counsel.

Although the certification provided by WesTech's expert stated the ram tensioner in question had a warning label affixed to it, Anzalone provided his own expert who stated in his deposition and report that "[t]here were no warning signs" on the subject ram tensioner. Aside from the controverted fact, the benefit of all reasonable inferences must be given plaintiff on the motion. The motion judge determined that "[t]he Navy posted warnings to stay away from the areas in which the replenishment systems were working." The posted warning, entitled "General Safety instruction for Fueling at Sea, Towing and Provisions at Sea," at very least has to be construed in favor of plaintiff, as the party opposing the motion, as concerning overall safety precautions during replenishment operations. There is no indication any warning label was placed directly on the ram tensioner. We also reject the attempt by WesTech to convert that general warning into a discretionary act on the part of the Navy that precluded WesTech from fulfilling a state law duty to warn.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ illegible
Clerk

FOR THE COURT:

/s/ James J. Petrella
JAMES J. PETRELLA,
P.J.A.D

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
[SEAL]

OFFICE OF THE CLERK
Richard J. Hughes Justice Comp
CN 006
Trenton, New Jersey 08615

TO: ALL COUNSEL OF RECORD

DATE: May 11, 1994

TITLE: Anzalone v. WesTech Gear Corp.

N.J. Super. (App. Div. 1994

DOCKET NO: A-4845-92T1

OPINION FILED: March 25, 1994

Dear Counsel:

The opinion filed in the above captioned appeal was found to need typographical, grammatical or substantive change(s). As a consequence, at the direction of the Court, please substitute the following page(s) (enclosed herewith) in your copy of the opinion:

Please substitute page 7 with the attached, corrected page 7.

Very truly yours,

Clerk of the Appellate Division

By: /s/ Susan Parrey
Susan Parrey,
Assistant Supervisor

> The specifications clearly provide that the ram tensioner subject to development was to be free standing, base mounted structure which could be placed anywhere upon a ship's deck.
>
> * * *
>
> [T]he specifications stated only that some means should be provided to prevent the wire rope from jumping the sheaves, and made no mention of guards for the ram tensioner or the lower sheave block in particular.
>
> * * *
>
> The installation of ram tensioners and the positioning of ram tensioners within the fuel replenishment system was done by the Navy with absolutely no involvement on the part of Western Gear.

Although we conclude that summary judgment was improperly granted, we agree with the motion judge that no genuine issues of material fact exists. There is no dispute that (1) WesTech had designed and manufactured the ram tensioner, in conjunction with Navy engineers and specifications; (2) the Navy had approved and accepted the ram tensioner; (3) the ram tensioner, as supplied to the Navy by WesTech, had no safety warnings or devices protecting the lower sheave assembly (the Navy specifications neither expressly prohibited nor required such warnings or devices; and (4) for purposes of the summary judgment motion, and consequently this appeal, it may be assumed that WesTech did in fact negligently design the ram tensioner in question.

Our analysis begins with *Boyle v. United States Technologies Corp.*, 487 *U.S.* 500, 108 *S. Ct.* 2510, 101 *L. Ed.* 2d

442 (1988), a 5-4 decision wherein the United States Supreme Court addressed when a

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION
A-4845-92T1

JOHN ANZALONE,

Plaintiff-Appellant,

v.

WESTECH GEAR CORPORATION, formerly known as or as successor to Western Gear Corporation,

Defendant-Respondent,

and

"JOHN DOE" (a fictitious name); "JOHN SMITH" INSTALLATION COMPANY, (a fictitious name),

Defendants.

(Filed Mar. 25, 1994)

Argued: February 22, 1994 – Decided: MAR 25 1994

Before Judges Petrella, Conley and Villanueva.[1]

On appeal from Superior Court, Law Division, Hudson County.

Maurice H. Connelly argued the cause for appellant (Mr. Connelly, on the brief).

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[1] Judge Villanueva did not attend oral argument but has participated in this appeal by consent of the attorneys.

Thomas T. Chappell argued the cause for respondent (Robyn K. Johnson, on the brief).

The opinion of the court was delivered by

PETRELLA, P.J.A.D.

Plaintiff John Anzalone appeals from a summary judgment order dismissing his complaint against defendant WesTech Gear Corporation (WesTech), formerly known as Western Gear Corporation. Anzalone asserts that the motion judge erroneously (1) applied the government contractor defense, and (2) determined that WesTech did not have either a contractually imposed or common law duty to install the ram tensioner or inspect its positioning aboard ship. We reverse solely on the basis of a misapplication of the government contractor defense.

During 1987, Anzalone, a civilian, worked for the U.S. Navy as a room steward aboard a naval tanker used for transporting fuel and supplies to vessels at sea. He apparently also had limited duties with respect to fuel replenishment operations undertaken by the tanker.

Transferring fuel and supplies between naval ships at sea involves an elaborate replenishment system consisting of numerous components, including a WesTech device known as a "ram tensioner." During a typical replenishment operation, a wire rope known as a "spanwire" or "highline" extends from the delivering ship to the receiving ship to provide support for connecting fuel and supply lines. The spanwire is reeved through a ram tensioner, which contains a series of pulleys at both ends of a vertical column (collectively termed the upper and lower sheave block or assembly). It is operated by a

hydraulic ram to maintain constant tension on the spanwire by either "paying out" or "taking in" the spanwire so as to prevent supply lines from falling into the water.

On March 20, 1987, Anzalone (a Bayonne, New Jersey resident) was on the USNS Waccamaw off the Virginia coast,[2] and was on a fuel replenishment detail when he tripped while he was walking adjacent to the open and unguarded lower sheave block. As he fell forward, Anzalone reached out with his left hand and grabbed one of the spanwires as it was being fed vertically downward from the upper sheave assembly into the lower sheave block of the ram tensioner. As a result of the spanwire passing through the lower sheave block, Anzalone's left hand was amputated at mid-palm.

According to the certification of A. Martin Hanke, a Navy engineer from 1941 to 1973, who originated the concept of the ram tensioner, the Navy awarded the first contract for design and development to Sancor Corporation in 1958. On August 7, 1961, after testing and evaluating the Sancor ram tensioner at sea, the Navy drafted specification SHIPS-T-3945, which provided in pertinent part:

> 3.2.6 *Sheaves.* – Sheaves shall be designed for one inch wire rope (breaking strength of 85,600 pounds). Means shall be provided to prevent the wire rope from jumping the sheaves.

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[2] Obviously jurisdiction in this state is grounded on the New Jersey residence of Anzalone. WesTech's attempt to remove the matter to the federal court was rejected.

* * *

3.13 *Workmanship.* – Workmanship shall be of the highest quality commensurate with the intended use.

Additionally, Navy specifications provided in part:

The Contractor shall furnish the services of a competent engineer(s) for checking and placing the hydraulic ram tensioners in a satisfactory operating condition. These services shall consist of assisting the yard in operating and testing the equipment and instructing yard and ship personnel in proper operation of the equipment. Due to the special nature of equipment involved these services are considered essential and special attention is invited to this requirement.

The engineering services shall be performed within the limits as to places, if any, and period specified therefor, at specific places and times which shall be designated by the Chief, Bureau of Ships, Code 622A, or his duly authorized representative.

* * *

The Government may require less than the total amount of services set forth above be furnished. In such event or in the event that the Government does not designate times and places sufficient for the full performance of said total amount of services within the period provided therefor, those services not furnished shall be deemed to be terminated for the convenience of the Government at no cost to the Government.

Based upon specification SHIPS-T-3945 and the final Sancor drawings, the Navy issued a procurement request that sought proposals for the development, manufacture,

and testing of seventy-eight hydraulic ram tensioners.[3] The Navy subsequently awarded WesTech, then known as Western Gear, the contract to manufacture the ram tensioners.

According to a certification of Charles S. Forve, employed by WesTech since 1966 and currently manager of contracts and special products, a subcontractor for WesTech provided the Navy with the subject ram tensioner in either late 1963 or early 1964. Forve further stated:

> All of the ram tensioners provided to the Navy or Naval suppliers by Western Gear/WesTech were manufactured in accordance with strict written military specifications. During my tenure at Western Gear/WesTech, the Navy never objected to any of the ram tensioners on the basis of nonconformity with military specifications. The military specifications for ram tensioners have never required guards for the lower sheave block of the ram tensioner.

Although stating that the SHIPS-T-3945 specification and Sancor drawings "establish[ed] a pattern of detail and precision," Hanke also stated that the initial procurement for ram tensioners "did not require any guarding of the lower sheave block area." With respect to the upper and lower sheave blocks, Hanke further opined:

> In my experience at the Navy, its approval of drawings and proposals was never merely a

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[3] According to a certification of R.T. Hawley, then chief engineer for WesTech, the procurement request had modified and supplemented specification SHIPS-T-3945.

> stamp of approval without substantive evaluation; the Navy was always intimately involved with the design and development of all deck equipment and the design and development of the ram tensioner was no exception.
>
> * * *
>
> During my tenure with the Navy, guards for the lower sheave blocks of ram tensioners were never required by the specifications or the accompanying drawings in a procurement of ram tensioners.

According to Hanke, WesTech had suggested various design features for the ram tensioner that the Navy had challenged, modified, or rejected. As to the installation of the ram tensioners, Hanke said:

> The specifications provided to Western Gear for the production of ram tensioners often contained provisions which stated that the manufacturer was to provide engineering services in connection with the supply of the equipment. Such engineering services were performed only at the request of the Navy and Western Gear had no obligation to provide them unless the Navy requested and paid for those services under the option provided in the contract. Engineering services did not include installation, erection or arrangement of the ram tensioner. Installation and arrangement of the ram tensioner was the sole responsibility of the Navy and the ship builder; Western Gear had no authority to install the ram tensioners it provided and had absolutely no input as to the placement of a ram tensioner within [a replenishment] configuration.

In sum, Hanke believed that the "ram tensioner was a piece of U.S. Navy deck machinery, conceived and developed by the Navy at Navy expense, and its design and application on U.S. Navy ships was completely controlled by the U.S. Navy."

Additionally, R.T. Hawley, who worked at WesTech from 1939 to 1979, and was chief engineer primarily responsible for the development and manufacture of ram tensioners for installation on naval ships, outlined the various military specifications for the ram tensioner in his certification and added:

> The specifications further provide that the ram tensioner should reflect the utmost in simplicity and reliability, and that the ram tensioners should be easy to install and maintain with a minimum of skilled personnel.
>
> The specifications clearly provide that the ram tensioner subject to development was to be free standing, base mounted structure which could be placed anywhere upon a ship's deck.
>
> * * *
>
> [T]he specifications stated only that some means should be provided to prevent the wire rope from jumping the sheaves, and made no mention of guards for the ram tensioner or the lower sheave block in particular.
>
> * * *
>
> The installation of ram tensioners and the positioning of ram tensioners within the fuel replenishment system was done by the Navy with absolutely no involvement on the part of Western Gear.

Although we conclude that summary judgment was improperly granted, we agree with the motion judge that no genuine issues of material fact exists. Both parties agree that (1) WesTech had designed and manufactured the ram tensioner, in conjunction with Navy engineers and specifications; (2) the Navy had approved and accepted the ram tensioner; (3) the ram tensioner had no safety warnings or devices protecting the lower sheave assembly (the Navy specifications neither expressly prohibited nor required such warnings or devices); and (4) for purposes of the summary judgment motion, and consequently this appeal, it may be assumed that WesTech did in fact negligently design the ram tensioner in question.

Our analysis begins with *Boyle v. United Technologies Corp.*, 487 *U.S.* 500, 108 *S. Ct.* 2510, 101 *L. Ed.* 2d 442 (1988), a 5-4 decision wherein the United States Supreme Court addressed when a contractor providing military equipment to the federal government could be held liable under state tort law for an injury caused by a design defect. Boyle, a marine copilot, was killed when the helicopter in which he was flying crashed off the coast of Virginia. Although Boyle survived the crash, he subsequently drowned because he was unable to escape from the helicopter. His father brought suit against United Technologies Corporation, which built the helicopter, asserting that it had defectively designed the copilot's emergency escape hatch because it opened outward instead of inward and, as such, was ineffective in a submerged craft due to water pressure.

Justice Scalia, writing for the Court, recognized that the suit implicated the "uniquely federal" interest

involved in the procurement of equipment by the federal government, even though the dispute was one between private parties, *id.* at 505-506, because "imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 507.

Justice Scalia added, however, that the presence of a uniquely federal interest did not end the inquiry, rather it merely established a necessary, not a sufficient, condition for the displacement of state law that:

> will occur only where, as we have variously described, a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law' or the application of state law would 'frustrate specific objectives' of federal legislation. *Ibid.* (citations omitted).

The majority opinion distinguished *Miree v. DeKalb County,* 433 *U.S.* 25 (1977), where the Court had refused to displace state law in a suit brought by certain private parties as third-party beneficiaries to an agreement between a municipality and the Federal Aviation Administration, reasoning that the suit brought there did not seek to impose upon the person contracting with the government a duty contrary to the duty imposed by the government contract. Rather, it was the contractual duty itself that the third-party beneficiaries attempted to enforce, with any federal interest in the outcome being far too remote and speculative to justify the application of federal law.

In *dicta*, Justice Scalia discussed an intermediate situation where state law might apply:

> Between Miree and the present case, it is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed. If, for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context. [*Id.* at 508-509.]

With respect to the helicopter specifications involved in *Boyle*, he reasoned:

> Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner [Boyle] claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications). [*Id.* at 509.]

Justice Scalia added, however, that it would be unreasonable to say that there is always a "significant conflict" between the state law and a federal policy or interest,

even in this sort of situation, providing the following example:

> If . . . a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered. [*Ibid.*]

Boyle then interpreted certain provisions in the Federal Tort Claims Act (FTCA) in an attempt to identify situations in which a "significant conflict" between federal interests and state law exists it the context of government procurement. *Id.* at 511. Specifically, *Boyle* relied upon 28 *U.S.C.A.* § 1346(b), which provides in pertinent part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Court pointed out an exception to this general principle in 28 *U.S.C.A.* § 2680(a):

> Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Based upon these statutory provisions, Justice Scalia reasoned:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for

> design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced. [*Boyle* 487 *U.S.* at 511-512.]

Against this backdrop, *Boyle* set forth a three-prong test to determine the scope of displacement in design defect cases:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. [*Id.* at 512.]

The reasons for these conditions were set forth:

> The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision. [*Id.* at 512-513.]

Here, WesTech argues that the government contractor defense bars recovery because it had conformed with reasonably precise specifications for the equipment, which the military had reviewed and approved.

Anzalone counters that the government contractor defense does not apply because installation of a safety device or warning with respect to the lower sheave assembly would not have been precisely contrary to or prohibited by an affirmative military specification. He relies on *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 *F.2d* 626 (2d Cir. 1990), where three persons and a survivor of a fourth, who had worked at a Navy shipyard during World War II, brought a failure-to-warn cause of action against the manufacturer-supplier who furnished the Navy with an asbestos-based cement according to "fairly precise design and testing specifications, with the most important such specification mandating that the product contain a substantial concentration of asbestos." *Id.* at 627. The Navy also issued instructions pertaining to the product's packaging, packing, and labelling.

The Second Circuit initially determined that *Boyle* applied not only to design defect suits, but also to failure-to-warn claims. *See Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1024-1025 (S.D. Ill. 1989); *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598, 604 (D. Conn. 1988). *But cf. Harduvel v. General Dynamics Corp.* 878 F.2d 1311, 1317 (11th Cir. 1989) (*Boyle*, by its terms, applies only to defects in design), *cert. denied*, 494 *U.S.* 1030 (1990).

In considering under what circumstances *Boyle* required displacement of a state law duty to warn, the Second Circuit in *Asbestos Litigation* reasoned:

> We agree with the district court that for [appellant] to establish that *Boyle* displaces any state law duty to warn, [appellant] must show that the applicable federal contract includes warning requirements that significantly conflict with those that might be imposed by state law. Moreover, it seems clear to us that *Boyle*'s requirement of government approval of "reasonably precise specifications" mandates that the federal duties be *imposed* upon the contractor. The contractor must show that whatever warnings accompanied a product resulted from a determination of a government official, *see Boyle*, 108 S.Ct. at 2518 ("feature in question [must be] considered by a Government officer, and not merely by the contractor itself"), and thus that the Government itself "dictated" the content of the warnings meant to accompany the product. See *Nicholson*, 697 F.Supp. at 604. Put differently, under *Boyle*, for the military contractor defense to apply, government officials ultimately must remain the agents of decision. [*Id.* at 630.]

The court rejected the manufacturer's assertion that the government made a discretionary decision not to warn persons in the position of ship workers of the dangers they faced from coming in contact with asbestos:

> [Appellant], however, omits a crucial distinction between the discretionary function exception and the military contractor defense. Stripped to its essentials, the military contractor's defense under *Boyle* is to claim, "The Government made me do it." *Boyle* displaces state law only when

> the Government, making a discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion. [*Id.* at 632.]

Ultimately, although "not impressed" with the manufacturer's arguments opposing summary judgment, the court remanded for reconsideration of "whether the various Navy packaging, packing, and labeling requirements appearing in the record or the various editions of the Navy Shipment Marking Handbook establish a genuine issue of material fact that the Government might have precluded [appellant] from including any product warnings with the goods alleged to have injured the [appellees]." *Id.* at 637.

In *Dorse v. Armstrong World Industries, Inc.*, 716 *F. Supp.* 589 (S.D. Fla. 1989), *aff'd o.b.*, 898 F.2d 1487 (11th Cir. 1990), plaintiff brought a failure-to-warn cause of action in an asbestos case against a contractor. There, the Florida District Court distinguished between failure-to-warn and design defect suits, by stating:

> On the one hand, the court agrees with the defendant that *Boyle* is not strictly limited to design defect cases. The government contractor defense, for example, could arise when the government prohibits a specific warning. On the other had, the court agrees with plaintiff that the three-part test of [*Boyle*] is necessarily limited to design defect cases. [*Id.* at 590.]

In order to resolve the "dilemma" of applying *Boyle* to a failure-to-warn cause of action, the court adopted its

own two-prong test, and found that, despite the presence of a uniquely federal interest, there was no conflict "between the state tort duty and the federal contractual duty." *Id.* at 591.

Here, both *Asbestos Litigation* and *Dorse* support the proposition that to displace state tort law, WesTech must show that the government imposed certain contractual obligations upon it that had contravened or significantly conflicted with the operation of state law.

WesTech argues that these cases are distinguishable because their focus is the application of *Boyle* to claims based upon a state law duty to warn as opposed to state law concerning design defects. We disagree.

As stated in Judge Minor's concurring opinion in *Asbestos Litigation*:

> In an effort to distance the case at bar from *Boyle*, the majority notes a "contrast" between the design defect theory put forward by the plaintiff in *Boyle* and the "alleged failure to warn, a separate tort theory," *ante* at 629, put forward by the plaintiffs here. The distinction is hardly so sharp as to be called a "contrast," however. Defects in product manufacturing and design and failure to warn of product hazards are all of a piece under the general rubric of strict products liability. *See generally* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 99, at 695-98 (5th ed. 1984). [*Id.* at 637 (Miner, J., concurring).]

See Feldman v. Lederle Laboratories, 97 *N.J.* 429, 449 (1984), (*Feldman* I) (defect in product giving rise to strict liability

may take the form of manufacturing flaw, design defect, or inadequate warning).

Although there are cases that arguably support the position of WesTech, each is distinguishable. In *Kleeman v. McDonnell Douglas Corp.* 890 F.2d 698 (4th Cir. 1989), *cert. denied*, 495 *U.S.* 953 (1990), for instance, plaintiffs sued a contractor, alleging failure to conform with reasonably precise Navy specifications with respect to the landing gear of a F/A-18 fighter jet. In affirming summary judgment for the contractor, the court said:

> Plaintiffs' claim is precisely the sort for which the defense was intended. This is true both because of the nature of defendant's product and the characteristics of the process by which it was designed. At issue here is a discretionary decision involving military hardware in which the government was a substantial participant.
>
> * * *
>
> It is hard to imagine a matter more uniquely in the province of the military – and one less appropriate to second-guessing by civilian courts – than the development of a high technology, multi-mission aircraft. [Citation omitted]
>
> Similarly, the design details of the F/A-18 illustrate the balancing of military and technological factors, including "the trade-off between greater safety and greater combat effectiveness." [citation omitted] For example, the main landing gear at issue here had to absorb extremely high amounts of energy generated upon landing on a carrier. On the other hand, stowage of the gears could not interfere with external weapon storage. These competing concerns required a

> unique "levered gear" design to provide adequate distance between the extended right and left main landing gears and thereby ensure stability of the aircraft upon landing. The design, developed by MDC and approved by the Navy, employed a planning link assembly to deplane the wheels during retraction and extension of the landing gear. [*Id.* at 700-701.]

After exchanging views in the procurement process with defendant, balancing military and technological factors, and maintaining "an extensive staff of aircraft engineers" on site at defendant's facilities, the Navy had exercised discretion regarding the landing gear to be used. *Id.* at 701. Against this backdrop, the court reasoned:

> It is this salient fact of governmental participation in the various stages of the aircraft's development that establishes the military contractor defense. Indeed, active governmental oversight is relevant to all three elements of defendant's burden. Where, as here, the Navy was intimately involved at various stages of the design and development process, the required governmental approval of the alleged design defect is more likely to be made out. [citations omitted] Similarly, the Navy's extensive participation, including reservation of the power to approve or disapprove design modifications, enhances the likelihood of final product conformity. Government involvement in the process also makes it more likely, though not certain, that a sharing of information will occur with respect to potential dangers in the use of equipment. [*Ibid.*]

Here, unlike *Kleemann*, there are no specifications with respect to safety devices. There is nothing in the

record to indicate that the government exercised any discretion in this regard, let alone balanced any technical or military considerations or shared information concerning potential dangers. Stated differently, plaintiff in *Kleemann* attacked as defective the very item upon which the Navy had exercised its discretion, *i.e.*, the landing gear. This is far different than the situation here, where Anzalone attacks a defect that the government specifications had not addressed and left to WesTech's discretion. Had the Navy required certain safety mechanisms, but not particularized any type of design, WesTech would then be able to argue that it had conformed with reasonably precise specifications even if it had not employed the safest device. That did not happen here, however.

Harduvel v. General Dynamics Corp. supra (878 F.2d 1311) is likewise distinguishable. In *Harduvel*, the widow of a fighter pilot who died in a training exercise brought suit against the manufacturer of the F-16 aircraft, asserting that "wire chaffing" or a massive electrical failure had caused the fatal crash. A jury found defendant liable and awarded plaintiff and the deceased's estate a total of $3.1 million in damages. The Eleventh Circuit reversed, because the government had exercised discretion over the electrical system.

Here, however, the record reasonably supports an inference that the government ignored any safety measures. Furthermore, the *Kleemann* and *Harduvel* courts refused to equate failure to perform, *i.e.*, the landing gear in *Kleemann* and the electrical system in *Harduvel*, with an absence of conformity. There is an obvious absence of conformity with reasonably precise specifications here

because no guidelines or specifications exist with respect to safety devices or measures.

More importantly, WesTech cannot be accorded immunity here based upon the government contractor defense because it could have fulfilled both its contractual obligation to the government and a state-prescribed duty of care,[4] as it is abundantly clear that no significant conflict exists between them. Although a conflict alone will not suffice to displace state law, the absence of one certainly precludes pre-emption by so-called federal common law, as stated by Justice Scalia, "[b]ut conflict there must be." Thus, the Navy did not make WesTech do anything – it chose not to provide any safety measures or warnings and, in the absence of such significant conflict, state tort law applies.

Nor can WesTech claim that the Navy imposed a significant conflict by deciding not to adopt safety devices or guards because the government neither expressly prohibited nor required any type of safety mechanisms or warnings on the ram tensioner in question. Indeed, the very absence of any specific guidelines or criteria within the otherwise precise specifications evinces indifference on the part of the Navy regarding safety mechanisms.

---

[4] We recognize the potential theoretical problem of different state law applications dependent upon the residence of an injured plaintiff where the injury occurs outside the jurisdiction. In the absence of a controlling authority, however, a state court can apply appropriate conflict of law criteria. Since the issue has not been raised or briefed, we merely note the problem.

Moreover, since the Navy did not exercise any discretion with respect to safety measures, it cannot be said now that it is being "second-guessed" or its governmental discretion is being infringed upon because it never considered the issue in the first place. Finally, WesTech cannot establish that in making its decisions concerning safety devices it had been acting in compliance with reasonably precise specifications because there were no such safety specifications set forth.

Anzalone's assertion that WesTech had either a contractual or common law duty to install the ram tensioner or inspect its positioning aboard ship is without merit. The naval specifications simply do not contain any provision that required WesTech to "install" the ram tensioners it sold to the Navy. Even if they did, the Navy had the authority to depart from such specifications. In any event, based on the record, WesTech was not involved with the installation of the particular ram tensioner.

Reversed and remanded for further proceedings consistent herewith.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

/s/ Illegible
Clerk

THOMAS T. CHAPPELL, ESQ.
ONE LACKAWANNA PLAZA
P.O.BOX 4205
MONTCLAIR, N.J. 07042-4205
(201) 509-7500
ATTORNEY FOR DEFENDANT, WESTECH GEAR CORPORATION

ORDER FOR SUMMARY JUDGMENT
(Filed May 11, 1993)
John A. McLaughlin, Judge

JOHN ANZALONE, Plaintiff, vs. WESTECH GEAR CORPORATION, ET ALS. [sic], Defendants,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION HUDSON COUNTY DOCKET NO. W-008041-89 CIVIL ACTION **ORDER FOR SUMMARY JUDGMENT**

The above entitled matter having been opened to the court on motion of defendant, and the court having examined all papers submitted by both plaintiff and defendant and having heard the arguments of counsel on March 12, 1993 and on April 30, 1993,

It is hereby ORDERED this 11th day of May 1993 that summary judgment be entered in favor of the defendant and against the plaintiff in accordance with the provisions of Rule 4:46.

/s/ John A. McLaughlin
JOHN A. McLAUGHLIN J.S.C
JOHN A. McLAUGHLIN J.S.C

(2)

Supreme Court, U.S.
FILED
NOV 21 1995
CLERK

No. 95-670

In The

Supreme Court of the United States

October Term, 1995

WESTECH GEAR CORPORATION,

Petitioner,

vs.

JOHN A. ANZALONE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAURICE H. CONNELLY, ESQ.
594 Broadway
Bayonne, New Jersey 07002
Telephone: (201) 339-9088

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Where government specifications are silent about safety devices, (i.e., neither prohibit them, nor require them), so that a contractor could have supplied them without acting "contrary" to the specifications, is a contractor which fails to provide such safety devices, entitled to invoke the "government contractor defense"?

2. To phrase the issue another way, why should a government contractor who isn't required by government specifications, to make military equipment unsafe, be excused from liability for its own negligence or defective equipment?

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STATEMENT OF THE CASE

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed. 2d 442 (1988), this Court held that in circumstances where the government specifications for military equipment required the safety defect, so that a safety device would be "contrary" to the specifications, the "government contractor defense", barred State law tort claims against a contractor failing to provide the safety device if (1) the United States approved reasonably precise specifications for the equipment, (2) the equipment conformed to those specifications, and (3) the contractor warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. [Id. at 508, 509, 512].

At issue in the instant case however, is whether, under *Boyle*, a contractor, failing to provide safety devices, also has that defense, where the government specifications were silent about safety devices (i.e., neither required the safety defect, nor prohibited the safety devices), so that they could have been supplied without acting "contrary" to the specifications, and where the government had not exercised any "discretion" regarding such safety devices. It is the Respondent's position that in such circumstances the Contractor/Petitioner does not have the defense.[1]

---

[1] (The Petitioner's contention [Pet. P. 2], that *Boyle* would allow it the defense in such circumstances is a misinterpretation of the law, since it ignores this Court's reasoning at pages 508, 509 & 512 of *Boyle*)

A. Proceedings In The Trial Court

The Respondent generally concurs with the Petitioner's Factual Statement of the Proceedings in the trial Court up to the April 30, 1993, entry of Summary Judgment in favor of the Petitioner, as set forth on pages 3 & 4 of the Petition. However, the Respondent would supplement the Petitioner's factual statements to add that the evidence before the trial Court showed that the ram tensioner is a multi-piece system, with its control station located some distance from the ram tensioner itself, on which the lower sheave pulleys were located.

The evidence before the trial Court also demonstrated that the Navy's specifications for the ram tensioner expressly invited **"alternative** (design) **proposals"**, (SHIPS-T-3945, Specification Continuation Sheets, Page 3, Para. 7) [Resp. App. 2a].

The uncontradicted evidence was also that the Navy's specifications for the ram tensioner, were silent about whether the Contractor/Petitioner should supply any safety guards, safety warnings, or chaining off of the lower sheave pulleys of the ram tensioner. The specifications neither required any safety defect, nor prohibited any safety device. This evidence further indicated that the only Navy specification discussing the design of the sheave pulley assembly, was section 3.2.6 "SHEAVES", which simply stated:

> "3.2.6 SHEAVES. – Sheaves shall be designed for one inch wire rope (breaking strength of 85,600 pounds). Means shall be provided to prevent the wire rope from jumping the sheaves." [Pet. App. 35a]

The Navy's specifications also required the Petitioner to provide "Engineering Services" to place the ram tensioner in satisfactory condition and to assist and instruct yard and ship personnel in the operation and testing of the equipment [Pet. App. 35a]. The evidence also indicated that the Navy had paid for these services.

The uncontradicted evidence also indicated that after receipt of the Navy's procurement specifications, the Petitioner, principally developed the design of the ram tensioner, and that during the course of its development, the petitioner made significant changes in the initial prototype, was responsible for testing the equipment, and for providing guidance to the Navy in the service and overall operation of the ram tensioners.

More importantly, there was no evidence that Western Gear and the Navy had any discussions or correspondence regarding the design features of the lower sheave assembly of the ram tensioner.[2] There was also no evidence of any discussions, correspondence, or specifications relating to safety devices for the lower sheave assembly of the ram tensioner, or of the placement or content, of any safety warning notices. The evidence, including admissions from the petitioner's own design engineers, also confirmed that the sheave pulleys for the ram tensioner in question, could have been guarded.

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[2] That portion of the Petitioner's statement at page 5 of its Petition, indicating that there were extensive discussions of the design of the lower sheave assembly, is not supported by the evidence presented to the Courts below and, as such, is a misstatement of the factual evidence.

After reviewing the evidence, the trial Court below made fact findings that the Navy's specifications for the ram tensioner in question, were silent about whether or not guards, warnings or chaining off were required, and that the specifications did not prohibit them. The Petitioner did not appeal from these fact findings. In spite of these findings, the trial court dismissed the Respondent's Complaint, because, in its erroneous view, by complying with the specifications, – even though the specification obligations were not "contrary" to the State law safety requirements, – the Petitioner met the requirements for the government contractor defense.

B. Proceedings Before the Superior Court of New Jersey, Appellate Division.

Respondent concurs with the Petitioner's Statement regarding these proceedings insofar as the statement goes; however, Respondent would add that the New Jersey Superior Court, Appellate Division, expressly found from the record, that "There are no specifications with respect to safety devices". It also found that the Navy did not exercise any discretion or balance any considerations with respect to safety measures". [Pet. App. 51a]. It further found that the safety defect in the ram tensioner was " . . . a defect that the government specifications had not addressed and left to WesTech's discretion" [Pet. App. 51a], that "the government ignored any safety measures" [Pet. App. 52a], and evidenced "indifference" to them [Pet. App. 53a].

C. Proceedings Before the New Jersey Supreme Court.

Respondent generally concurs with the Petitioner's Statement of such proceedings at pages 7 & 8 of its Petition, with one important exception; Respondent does not agree with the Petitioner's conclusory statement that "the other elements of the *Boyle* test had been established by the Petitioner".[3] On the contrary, the Court held that the Petitioner had not shown that the safety devices would have been "contrary" to the Navy specifications. On this issue, the Court expressly held:

> "Literally, the specifications neither required nor prohibited the inclusion of a safety feature. Thus, in this case, it does appear, in the language of *Boyle* that "the duty sought to be imposed on the contractor" – the inclusion of a safety feature on the ram tensioner – "is not identical to one assumed under the contract" or "promised the Government," nor is it "contrary to any [duty] assumed." [Pet. App. 16a]

With respect to whether the Navy exercised any discretion with respect to safety devices, the Court also found, from the record, that the Navy evinced "indifference" to safety mechanisms [Pet. App. 22a], that the omission of any safety features relating to the lower sheave assembly of the ram tensioner was not a "choice exercised by the government" [Pet. App. 22a], that the government was "not concerned with the safety aspects

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[3] The Petitioner's statement to the contrary [P. 7] is a misstatement of fact and/or law.

of the ram tensioner", and failed to "exercise[d] any discretion" with respect to safety devices. [Pet. App. 24a]

REASONS FOR THE COURT TO DENY THE PETITION FOR CERTIORARI

I. THERE IS NO "SIGNIFICANT CONFLICT" DISPLACING STATE LAW IN THIS CASE BECAUSE THE INCLUSION OF THE SAFETY DEVICES WOULD NOT BE "CONTRARY" TO GOVERNMENT SPECIFICATIONS

The principal reason that the Petition should be denied is that the New Jersey Supreme Court correctly interpreted and applied *Boyle*. It did not mischaracterize or add any new requirement, but merely applied the reasoning and criteria expressly stated by this Court in the *Boyle* case, itself.[4] It correctly held that the Contractor/Petitioner in this case, does not have the "government contractor defense" because:

> " . . . the contractor could have fulfilled its duty to the government and simultaneously complied with a state-law duty to render the product safe without infringing on the discretion exercised by the government." [Pet. App. 25a]

In *Boyle*, this Court dealt with a situation in which the government contract specifications for the helicopter

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[4] The Petitioner's statement to the contrary [Pet. P. 12, 17 & 18] is a misstatement of fact and/or law.

in question, affirmatively required the hazardous, outward opening, escape hatch. The contractor had no "**discretion**" to make it open any other direction. There was no way the contractor could have made the door safer without acting "**contrary**" to the specifications (Id. at P. 509). That fact was absolutely crucial to this court's holding and was the precise reason it distinguished its decision from an earlier case, (*Miree*), which did not displace State law. [Id. at 508, 509]. At page 509, this Court expressly stated:

> "the present case, however, is at the opposite extreme from *Miree*. Here the state imposed duty of care that is the asserted basis of the contractor's liability (specifically the duty to equip helicopters with the sort of escape hatch mechanism petitioner claims was necessary) is **precisely contrary** to the duty imposed by the government contract (the duty to manufacture and deliver helicopters with the sort of escape hatch mechanism shown by the specifications)" {Emphasis Ours}

In the instant case, unlike *Boyle*, the specifications were totally silent. They neither required the safety defect, nor prohibited any safety devices for the ram tensioner; so the Petitioner, could have provided the safety devices , without acting "**contrary**" to those specifications – but it failed to do so. Consequently, it does not have "government contractor defense".

This Court also gave an express example of when the "government contractor defense" would not apply. At page 509, this Court expressly stated:

> " . . . If for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the government, but neither would it be contrary. **The contractor could comply with both its contractual obligations and the state prescribed duty of care.** No one suggests that state law would generally be preempted in this context." {Emphasis Ours}

Finally, at page 512 of *Boyle*, this Court also expressly stated:

> "it makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is **'necessary'** when the Government produces the equipment itself, but not when it contracts for the production." {Emphasis Ours}

The operative word is **"necessary"**. *Boyle*, therefore, stands for the proposition that where the safety defect was "necessary", so that the safety devices **would be "contrary"** to the government specifications, the contractor can invoke the government contractor defense. In the instant case, however, the safety defect (i.e., lack of safety devices for the sheave pulleys) was not "necessary" – it was not required by the government specifications. The contractor could have provided the lacking safety devices

without acting "contrary" to the specifications. Consequently, the Petitioner is not entitled to invoke the defense. The Petitioner's interpretation of *Boyle*, would render this Court's above quoted statements, absolutely meaningless.

The record before the New Jersey Supreme Court contained clear, unappealed, trial and appellate level fact findings, that the specifications were silent about safety devices or warnings, and did not prohibit them [Pet. App. 39a, 53a]. After reviewing this record, the New Jersey Supreme Court also found that the specifications neither required nor prohibited any type of safety mechanisms or warnings on the ram tensioner in question. [Pet. App. 5a, 14a, 15a, 16a], and that the Petitioner could have included them without acting "contrary" to those specifications. [Pet. App. 5a, 15a, 25a]

In addition, as previously stated, the New Jersey Supreme Court also factually found, that the government failed to exercise any "discretion" with respect to the safety devices or warnings for the ram tensioner. The Court specifically held:

> "The record in this case, discloses that the federal government was not concerned with the safety aspects of the ram tensioner or the need for provisions for safety features in the specifications. We thus fully agree with the Appellate Division, which found that 'there is nothing in the record to indicate that the government exercised any discretion' with respect to safety devices." [Pet. App. 24a]

Since the New Jersey Supreme Court specifically concluded that the Navy's specifications did not prohibit any

safety devices or warnings for the ram tensioner, so that the contractor could have provided them without acting "contrary" to those specifications, and further, since the record conclusively indicated that the Navy failed to exercise "any discretion" or "choice" with respect to safety mechanisms for the ram tensioner, the Court correctly and accurately applied *Boyle*, in expressly finding:

> "We hold that the government specifications, according to which the ram tensioner was designed, manufactured and supplied, did not impose any requirements that would conflict with the duty of the contractor under state law to provide a product that incorporated a safety feature for the lower sheave assembly of the ram tensioner, and, hence, the government contractor defense is not applicable as a bar to defendant's liability." [Pet. App. 5a]

II. THE PETITIONER MISCHARACTERIZES THE NEW JERSEY SUPREME COURT HOLDING

The Petitioner's contention [Pet. P. 11, 12 & 22], that the New Jersey Supreme Court held that to have the defense, the Petitioner " . . . must prove that the specific defect at issue – the absence of a guard on the lower sheave assembly – was expressly required or prohibited by the Navy", is a misstatement of law, and a misinterpretation of the New Jersey Supreme Court decision. The New Jersey Supreme Court's holding is very clear. [Pet. App. 5a] It never held that "the specific defect at issue", must be "expressly required or prohibited". – That was precisely the reason for its factual finding that there was nothing in the record to indicate that the Government

exercised "any discretion" or "choice" with respect to safety devices for the ram tensioner, before deciding that there was no "government contractor defense". [Pet. App. 22a, 24a] The Petitioner has also failed to cite any statement whatsoever, in the New Jersey Supreme Court decision, indicating that it held as Petitioner claims.

The Petitioner's additional claim, [Pet. P. 11, 12], that suits in the Federal Courts in New Jersey would have a contrary outcome to those in the State Courts, because the Federal Courts would follow *Maguire v. Hughes Aircraft Corp.*, 725 F. Supp. 821 at 824 (D.N.J. 1989), Aff'd 912 F.2d 67 (3rd Cir. 1990), and that the New Jersey Supreme Court decision represents a "minority view" are also misstatements of fact and law.[5]

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[5] With respect to *Maguire* (supra), there is nothing in that case at conflict with the New Jersey Supreme Court holding in the instant case. In *Maguire*, the alleged defect (i.e., the use of the MPB bearing in the Allison Engine of a helicopter) was affirmatively **required** by the Army's design specifications themselves. The Court expressly found that the Army " . . . was responsible for the determination to use the MPB bearing in the Allison engine" (Id. 824). That fact was the very reason the defense was applied (Id. 824-825). There is absolutely no reason to believe that the Federal Courts governing New Jersey, would rule any differently from the New Jersey Supreme Court, in circumstances such as those in the instant case, where the contractor could have supplied the (lacking) safety devices without acting contrary to the specifications.

The New Jersey Supreme Court decision is not a "minority view". In fact, all Court decisions dealing with similar facts (i.e., specifications silent about safety devices, no prohibition, and no exercise of discretion regarding safety devices), have held in accordance with its decision.

The Petitioner's further contention [Pet. P. 12, 13, 14], that *Boyle* stands for the proposition that a "significant conflict" arises as a matter of law, once a contractor has complied with government specifications, even where those specifications have not considered nor prohibited safety devices, is also a misstatement of law. To the contrary, *Boyle* clearly stands for the proposition that a "significant conflict" will only exist where the provision of safety devices would be "contrary" to the government specifications. As this Court has already held in *Boyle*, a "significant conflict" would not arise if "the duty sought to be imposed on the contractor is not identical to one assumed under the contract but is also not contrary to any assumed." [Id. at 509]. This Court also pointed out in *Boyle*, that a "significant conflict" would not exist with State law, where the contractor could "comply with both its contractual obligations and the state prescribed duty of care . . . " [Ibid. at 509]

Finally, the Petitioner's claim [Pet. P. 13], that a "significant conflict" always exists, once the contractor has complied with the reasonably precise government specifications is absolutely at odds with this Court's express statement, in *Boyle* at page 512, that:

> "we are of the view that state law which holds government contractors liable for design defects in military equipment does **in some circumstances** present a 'significant conflict' with Federal policy". {Emphasis Ours}

This Court pointedly did not use the phrase "in all circumstances".

In the instant case, the government is not being "second guessed" as Petitioner claims [Pet. P. 14] with respect to the safety devices, because the record clearly indicates that the Navy didn't even consider the issue of safety devices or exercise any discretion with respect to them, in the first place.

The Petitioner's further contention [Pet. P. 14] that the New Jersey Supreme Court principally relied on two failure to warn cases, in its formulation of its opinion, is also a misstatement of fact.[6] The New Jersey Supreme Court decision, on its face, [Pet. App. 1a-25a] clearly indicates that the Court principally relied on this Court's *Boyle* decision, itself.

Petitioner's further claim [Pet. P. 15, 16] that the *In Re Joint Eastern & Southern District New York Asbestos Litigation*, 987 F.2d 626 at 632 (1990) and *Dorse v. Eagle Pitcher Industries, Inc.*, 898 F.2d 1487 (11th Cir. 1989) cases are "inapposite" because they involve failure to warn claims, is also a misstatement of law.[7]

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[6] The Court discussed the *Dorse* and *In Re Joint Eastern Asbestos Litigation* cases, only at portions of 4 pages of its 25 page decision. [Pet. App. 17a, 18a, 19a, 20a]

[7] The Petitioner's claim, in its footnote (p. 15), that the instant case does not involve a failure to warn claim, is again a misstatement of fact. The record below, including Respondent's interrogatory answers and expert report, clearly indicate that one of the Respondent's liability claims is failure to warn. – In New Jersey, the specific type of product defect does not have to be stated in the Complaint.

The Petitioner's further claim, in that footnote, that "the record below shows that a warning was placed on the ram tensioner and that the Navy controlled its contents and its

The fact that the particular safety defect involved in these two cases was lack of warnings (as opposed to another safety defect), played absolutely no part in the basis for the Courts' decisions. On the contrary, in both cases, the Courts stated their holdings in very expansive, general and broadly applicable terms, without restricting their holdings to a lack of warning situation.[8] In addition, as the New Jersey Appellate Division correctly noted, the lack of proper warnings on a potentially hazardous piece of equipment, is essentially a design defect. "They are all of a piece under the general rubric" of strict products liability, *In Re Asbestos Litigation*, (Supra), Judge Minor's concurrence. [Pet. App. 53a] See also: *Feldman v. Lederle Laboratories*, 479 A.2d 374, 97 N.J. 429, at 449 (1984).

The Petitioner's claims [Pet. P. 15, 18 & 19], that the Respondent's position has been "squarely rejected" by the 5th Circuit in *Stout v. Borg Warner Corp.*, 933 F.2d 331 (5th Cir. 1991), and that the facts in *Stout* are a "mirror image" of the instant case, are again misstatements of fact and law. On the contrary, *Stout* is clearly distinguishable

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placement" is also a misstatement of fact. – The New Jersey Superior Court, Appellate Division, expressly noted that based on the record, "there is no dispute that . . . the ram tensioner, as supplied to the Navy by WesTech, had **no safety warnings** or devices protecting the lower sheave assembly." [Pet. App. 39a] The Petitioner has submitted no specifications or other evidence to indicate that the Navy even considered warnings, much less controlled any warning, its contents or its placement.

[8] See also: *In Re Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992), which broadly stated the same language and also held that safety must be "contrary" to the specifications, to have the government contractor defense. [Id. 812-813]

on the facts, and is fully consistent with the New Jersey Supreme Court holding.

In the *Stout* case, (unlike the instant case), the specifications themselves required the characteristics which made the air conditioning unit unsafe and implicitly prohibited the safety device (i.e., a wire screen over the fan condenser). In *Stout*, the uncontradicted evidence was " . . . a protective screen covering the condenser fan **would restrict** the air flow to the unit and **impair** its ability to operate effectively in extreme hot weather conditions". [Id. at 335] The evidence also indicated that a protective screen would have been **"impracticable"** and **"not feasible"** [Id. at 335]

Consequently, in *Stout*, the safety device was clearly **"contrary"** to the specifications. – In the instant case however, even the petitioner's design engineers admitted that the ram tensioner in question could have been guarded. Moreover, in *Stout*, the final design specifications were "**frozen**" and "any variation by Fairchild from the detailed design at this point would result in automatic rejection of the unit by the Army" [Id. at 333]. In the instant case, however, where "alternative (design) proposals" were permitted, there was no such prohibition [Resp. App. 1a].

The Petitioner's contentions [Pet. P. 16, 17, 19], regarding the holding in *In Re Aircraft Crash Litigation, Frederick, MD.*, 752 F. Supp. 1326 at 1338 (S.D. Ohio 1990), is a severe misstatement of the law and an attempt to mislead this Court. More specifically, the Petitioner quotes only a portion of the trial Judge's dicta indicating that he was "not convinced" the *Asbestos Litigation* and

the *Dorse* cases were correct in their interpretation of *Boyle*; and that in his view, it is not necessary to factually show that a safety device would conflict with the government specifications, in order to have the defense. The Petitioner then states that the *In Re Aircraft Crash Litigation* case was upheld, in its entirety, in an unpublished opinion; – thus leaving the false impression that the trial Court's (erroneous) view, was also upheld on appeal.

The Petitioner's partial quotation, however, pointedly omits the Court's immediately following fact finding, which completely changes the import of the Petitioner's quoted language:

> "**Even if**, however, the Second and Eleventh Circuits' view of *Boyle* is accepted, the *Asbestos Litigation* and *Dorse* cases **are distinguishable on their facts** from those at issue in the instant case. Whereas in those cases the government contractors were not prevented by their contracts from providing the warnings that Plaintiffs therein argued were called for by state law, Defendants in the instant case had **no leeway** where the content of the accident aircraft's manuals was concerned, as the following uncontroverted facts demonstrate." [Id. at 1365] {Emphasis Ours}

Had the Petitioner disclosed this additional portion of the quotation, of which Petitioner was well aware, it would have been clear that the actual basis for the trial Court's decision to apply the "government contractor defense", was because the contractors had **"no leeway"** to deviate from the defective language of the aircraft manuals. Consequently, the safety defect was required and the case

was appropriately upheld. The Petitioner's misleading, partial quotation clearly seeks to create the false impression that this fact was not the basis of the Court's decision.

The Petitioner again misstates the holding of the New Jersey Supreme Court [Pet. P. 17, 18 & 19], as requiring a contractor, in every case, to prove that the government considered the safety aspects of a particular design, and to show that there was discourse regarding the specific design deficiency or safety features, in order to have the defense. – This is simply not true [Pet. App. 22a, 24a]. All the New Jersey Supreme Court holding stands for, in this aspect, is that in those situations where the specifications do not, explicitly or implicitly, prohibit a safety device, so that a contractor would presumably not have the government contractor defense, a contractor can still invoke the defense, if it can show that the government exercised discretion with respect to such safety devices.

The Petitioner's claim [Pet. P. 18], that the facts of the instant case are not distinguishable from *Boyle*, is also a clear misstatement of fact. In *Boyle*, as previously discussed, the safety defect was affirmatively required by the specifications, so the contractor **could not** provide safety devices without acting **"contrary"** to them. In the instant case, nothing in the specifications required the safety defect and the contractor **could have provided** the safety device **without acting "contrary"** to the specifications.

III. THE CASES OF *SMITH V. XEROX CORPORATION, HARDUVEL V. GENERAL DYNAMICS CORP., NICHOLSON V. UNITED TECHNOLOGIES CORP.* AND *WILSON V. BOEING CO.* (CITED BY PETITIONER) DO NOT, IN FACT, SUPPORT PETITIONER'S POSITION.

The Petitioner cites the cases of *Smith v. Xerox Corporation*, 866 F.2d 135 (5th Cir. 1989), *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 at 1318-1321 (11th Cir. 1989), *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598 at 604 (D.Conn. 1988), and *Wilson v. Boeing Co.*, 655 F. Supp. 766, 773 (E.D. Pa. 1987), [Pet. P. 19, 20, 21], as supporting its essential contention, that compliance with government specifications entitles it to the defense, even if the missing safety devices were not "contrary" to the specifications. – In fact, however, they do not.[9] In *Smith, Harduvel* and *Nicholson*, the safety defects were all affirmatively required by the specifications, themselves (unlike the instant case). Consequently, they appropriately applied the government contractor defense. The *Wilson* case (to be discussed *Infra*), is absolutely bad law and has no legal validity, at all.

In *Smith* (Supra), the alleged defect causing the injury (i.e., the inadequate waterproofing design) was affirmatively required by the Government specifications themselves.[10] These specifications dictated the specific

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[9] The Petitioner's contentions regarding these cases [Pet. P. 19, 20, 21], are misstatements of fact and law.

[10] The Petitioner's claim [Pet. P. 20], that the *Smith* Court did not address whether waterproofing procedures were affirmatively required by the specifications, is a misstatement of fact.

environmental criteria that the government wanted the Viper Weapons Simulator to meet in terms of temperature, humidity and salt resistance. [Id. at 138]. The specifications were not silent about such criteria. Moreover, this very fact, the requirement for the defect, was the exact basis for the Court's decision to apply the "government contractor defense". At page 138 the Court expressly held:

> "**Because** the government, in this case **supplied** the relevant environmental specifications it **wanted the Viper to meet**, which **were incorporated** into Xerox's production contract . . . **We find** that Xerox has satisfied its burden of proof in this issue." [Id. at 138] {Emphasis Ours}

Similarly, in *Harduvel V. General Dynamics Corp.*, (Supra), the safety defect, (i.e., the layout of the F16 wiring system) was again affirmatively required by the specifications themselves. The contractor was not free to change that wiring layout without acting "contrary" to the government specifications. The Court found the wiring chafing problem to be **"inherent"** in the required design of all electric F16's. [Id. at 1317, 1318] The dictionary definition of the word "inherent" is "necessary" or "essential".

Again, in *Nicholson v. United Technologies Corp.* (supra), the safety defect, (i.e., the incorrect language in a helicopter repair manual), was specifically and affirmatively required by the government's specifications themselves.[11] The specifications were not silent about the

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[11] The Petitioner's statement to the contrary [Pet. P. 11, 20 & 21] is a misstatement of fact and/or law.

language to be used. At page 604 the Court expressly found that the government set forth the exact contents of the manual, maintained control of the contents of the manual and made changes in it as it saw fit without any input from the printing contractor whatsoever. The printer was "obligated" by the government specifications to print the manual exactly as furnished by the government, without the authority to make any changes. These facts were crucial to the Court's decision, which expressly held:

> "A contractor should not be held liable for deficiencies in the contents of a maintenance manual if the contents were **dictated** by the Government." [Id. at 604] {Emphasis Ours}

Finally, the *Wilson* case (Supra), has no applicability whatsoever. It is a trial level decision, decided in 1987, the year **before** this Court's 1988 *Boyle* decision. Moreover, it is expressly based on an even older, 1985, Circuit Court decision in *Koutsoubos v. Boeing-Vertol*, 755 F.2d 352 (3rd Cir. 1985), cert. denied, ___ U.S. ___ 106, S.Ct. 72, 88 L.Ed.2d 59 (1985) [Id. at 771-772]. It does not address, interpret or apply the *Boyle* case at all.

PETITIONER'S MISSTATEMENTS OF FACT AND/OR LAW

The Petitioner's misstatements of Fact and/or Law at pages 2, 5, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 of its Petition, have been specifically indicated and expressly referred to as such, previously in this Brief and

are incorporated herein. In the interest of brevity, however, they are not being separately or expressly restated here.

CONCLUSION

For the above reasons, I respectfully request this Honorable Court to deny the Petition for Certiorari on the merits.

Respectfully submitted,

MAURICE H. CONNELLY, ESQ.
594 Broadway
Bayonne, NJ 07002
Tel. (201) 339-9088

Attorney for Respondent
John Anzalone

SCHEDULE – REQUEST FOR PROPOSALS AND PROPOSAL CONTINUATION SHEET – DD746-1

REQUEST NO.
622A-216.1

PAGE NO.
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NOTICE TO OFFERORS (continued)

6. Purchased Materials: [ ] If box is checked, Offerors shall furnish the following information with their proposals:

   (a) Principal materials or components to be purchased by the Offeror;

   (b) Proposed or established sources, including size classification (large or small business) of each source;

   (c) Proposed method of purchase (whether competitive or other than competitive) and reasons therefor;

   (d) Basis for award; i.e. low bidder or delivery, etc.;

   (e) Copies of suppliers' cost breakdowns and any price analysis made by the contractor if non-competitive;

   (f) Type of pricing arrangement;

   (g) Comparison with invoice prices of prior procurements, if any;

   (h) Organizational relationship, if any, of proposed supplier to Offeror; and

(i) In the circumstance of follow-on orders, an explanation of any changes in "make-or-buy" decisions substantially affecting the proposed price or creating diversification for the contractor at the expense of the Government.

7. Alternative Proposals: Alternative proposals may also be submitted provided that all deviations are clearly specified.

INSTRUCTIONS TO OFFERORS REGARDING SUBMISSION OF PROPOSALS

1. Close of Business: For the purpose of receiving proposals, the close of business of this establishment is 4:30 P.M. Eastern Standard Time.

2. Telegraphic Proposals: Telegraphic proposals will not be considered although proposals may be modified by telegraphic notice – provided such notice is *received* prior to the time set for the receipt of proposals.

3. Envelope for Proposals: It is important that proposals be mailed in the envelope provided for that purpose. Failure to do so may result in premature disclosure of your proposal. Envelopes must not be used for *forwarding anything other than proposals,* e.g., "No bid", etc.

4. Hand-Carried Proposals: Hand-carried proposals shall be personally deposited by carrier in bid box in Room . . . "N" Building, Located in rear of Main Navy Building, 16th Street and Constitution Avenue, N.W.

5. Wage Determinations: Your attention is directed to the possibility that wage determinations may have been . . .